

CA 20N

EAB

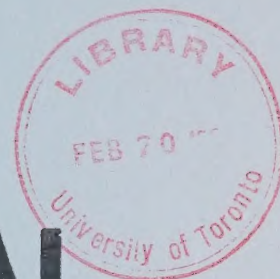
-H 26

EA-87-02

Government
Publications



Ontario



ENVIRONMENTAL ASSESSMENT BOARD

VOLUME: 179

DATE: Wednesday, January 31, 1990

BEFORE:

M.I. JEFFERY, Q.C., Chairman

E. MARTEL, Member

A. KOVEN, Member

FOR HEARING UPDATES CALL (TOLL-FREE): 1-800-387-8810

FARR &
ASSOCIATES
REPORTING INC.

(416) 482-3277

2300 Yonge St., Suite 709, Toronto, Canada M4P 1E4

HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental
Assessment for Timber Management on Crown
Lands in Ontario;

- and -

IN THE MATTER OF a Notice by the
Honourable Jim Bradley, Minister of the
Environment, requiring the Environmental
Assessment Board to hold a hearing with
respect to a Class Environmental
Assessment (No. NR-AA-30) of an
undertaking by the Ministry of Natural
Resources for the activity of timber
management on Crown Lands in Ontario.

Hearing held at the Offices of the
Environmental Assessment Board,
2300 Yonge Street, Suite 1201, Toronto,
Ontario, on Wednesday, January 31st,
1990, commencing at 10:00 a.m.

VOLUME 179

BEFORE:

MR. MICHAEL I. JEFFERY, Q.C.	Chairman
MR. ELIE MARTEL	Member
MRS. ANNE KOVEN	Member

A P P E A R A N C E S

MR. V. FREIDIN, Q.C.)	
MS. C. BLASTORAH)	MINISTRY OF NATURAL
MS. K. MURPHY)	RESOURCES
MS. Y. HERSCHER)	
MR. B. CAMPBELL)	
MS. J. SEABORN)	MINISTRY OF ENVIRONMENT
MS. B. HARVIE)	
MR. R. TUER, Q.C.)	ONTARIO FOREST INDUSTRY
MR. R. COSMAN)	ASSOCIATION and ONTARIO
MS. E. CRONK)	LUMBER MANUFACTURERS'
MR. P.R. CASSIDY)	ASSOCIATION
MR. H. TURKSTRA	ENVIRONMENTAL ASSESSMENT
	BOARD
MR. E. HANNA)	ONTARIO FEDERATION OF
DR. T. QUINNEY)	ANGLERS & HUNTERS
MR. D. HUNTER)	NISHNAWBE-ASKI NATION
MS. N. KLEER)	and WINDIGO TRIBAL COUNCIL
MR. J.F. CASTRILLI)	
MS. M. SWENARCHUK)	FORESTS FOR TOMORROW
MR. R. LINDGREN)	
MR. P. SANFORD)	KIMBERLY-CLARK OF CANADA
MS. L. NICHOLLS)	LIMITED and SPRUCE FALLS
MR. D. WOOD)	POWER & PAPER COMPANY
MR. D. MacDONALD	ONTARIO FEDERATION OF
	LABOUR
MR. R. COTTON	BOISE CASCADE OF CANADA
	LTD.
MR. Y. GERVAIS)	ONTARIO TRAPPERS
MR. R. BARNES)	ASSOCIATION
MR. R. EDWARDS)	NORTHERN ONTARIO TOURIST
MR. B. McKERCHER)	OUTFITTERS ASSOCIATION

Digitized by the Internet Archive
in 2023 with funding from
University of Toronto

<https://archive.org/details/31761116524588>

APPEARANCES: (Cont'd)

MR. L. GREENSPOON)	NORTHWATCH
MS. B. LLOYD)	
MR. J.W. ERICKSON, Q.C.)	RED LAKE-EAR FALLS JOINT
MR. B. BABCOCK)	MUNICIPAL COMMITTEE
MR. D. SCOTT)	NORTHWESTERN ONTARIO
MR. J.S. TAYLOR)	ASSOCIATED CHAMBERS OF COMMERCE
MR. J.W. HARBELL)	GREAT LAKES FOREST
MR. S.M. MAKUCH)	
MR. J. EBBS	ONTARIO PROFESSIONAL FORESTERS ASSOCIATION
MR. D. KING	VENTURE TOURISM ASSOCIATION OF ONTARIO
MR. D. COLBORNE)	GRAND COUNCIL TREATY #3
MS. S.V. BAIR-MUIRHEAD)	
MR. R. REILLY	ONTARIO METIS & ABORIGINAL ASSOCIATION
MR. H. GRAHAM	CANADIAN INSTITUTE OF FORESTRY (CENTRAL ONTARIO SECTION)
MR. G.J. KINLIN	DEPARTMENT OF JUSTICE
MR. S.J. STEPINAC	MINISTRY OF NORTHERN DEVELOPMENT & MINES
MR. M. COATES	ONTARIO FORESTRY ASSOCIATION
MR. P. ODORIZZI	BEARDMORE-LAKE NIPIGON WATCHDOG SOCIETY

APPEARANCES: (Cont'd)

MR. R.L. AXFORD	CANADIAN ASSOCIATION OF SINGLE INDUSTRY TOWNS
MR. M.O. EDWARDS	FORT FRANCES CHAMBER OF COMMERCE
MR. P.D. McCUTCHEON	GEORGE NIXON
MR. C. BRUNETTA	NORTHWESTERN ONTARIO TOURISM ASSOCIATION

I N D E X O F P R O C E E D I N G S

<u>Submissions:</u>	<u>Page No.</u>
Mr. Dahme (OFAH).....	31715
Mr. Lindgren (FFT).....	31748
Mr. Cosman (OFIA/OLMA).....	31783
Ms. Seaborn (MOE).....	31792
Ms. Blastorah (MNR).....	31804
Mr. Dahme.....	31847
Mr. Hanna (OFAH).....	31854

1. ---Upon commencing at 10:05 a.m.

2 THE CHAIRMAN: Thank you, ladies and
3 gentlemen. Please be seated.

4 Well, the only order of business for this
5 morning is to deal with the Ontario Federation of
6 Anglers & Hunters' motion with respect to the Board's
7 jurisdiction to deal or amend the purpose of the
8 undertaking as described by the proponent.

9 Mr. Dahme, I believe that you are acting
10 for the Federation today?

11 MR. DAHME: That is correct, Mr.
12 Chairman.

13 THE CHAIRMAN: You might as well sit at
14 the table when you are addressing the Board, because of
15 the sound system, the way we have it hooked up here, so
16 everybody can hear.

17 I guess we might as well proceed directly
18 with the presentation of the motion by yourself and
19 then we will deal with the other parties' support or
20 opposition to it.

21 MR. DAHME: Thank you, Mr. Chairman.

22 As the Board is aware, this is a motion
23 on behalf of the Ontario Federation of Anglers &
24 Hunters for a ruling that, first, this Board does have
25 the jurisdiction to review and reject an environmental

1. assessment should it find the purpose of the
2 environmental assessment to be inappropriately
3 formulated; and that, secondly, this Board has the
4 jurisdiction to amend the purpose of the undertaking as
5 stated by the proponent and then has the option of
6 amending or accepting or rejecting the undertaking
7 having consideration of that purpose.

8 MR. COSMAN: Mr. Chairman, if I may just
9 as a matter of preliminary submission before my friend
10 proceeds.

11 My friend has defined the question in two
12 parts, and I am not going to take issue either for
13 purposes of this argument, but the issue before the
14 Board is defined in the Notice of Motion and the Notice
15 of Motion is for purposes of a ruling from the Board
16 declaring that the Board has the jurisdiction under the
17 Act to review and amend the stated purpose of the
18 undertaking and that the stated purpose of the
19 undertaking is open for review and suggested amendment
20 by the parties through the presentation of evidence.
21 That is the issue as defined and that is the issue to
22 which I am addressing my argument.

23 If my friend wants to make additional
24 argument as to other powers that the Board has, that is
25 up to him, but I am here to make submissions as to the

1- issue as defined in the Notice of Motion itself.

2 MR. DAHME: I am satisfied to accept
3 that, Mr. Chairman.

4 THE CHAIRMAN: All right, Mr. Dahme,
5 because you can appreciate the parties have responded
6 in terms of their factums of fact and law to the
7 specific motion as put forward in writing by Mr. Hanna
8 earlier.

9 MR. DAHME: Yes. No, I am certainly
10 prepared to accept that.

11 Now, just then to take up on that point.
12 If this Board does have the jurisdiction to amend the
13 purpose of the undertaking, then this Board however
14 does have the option of rejecting the undertaking by
15 way of non-acceptance, or accepting the undertaking
16 following amendments of the undertaking to accommodate
17 that changed purpose. And I will be referring to the
18 sections of the Environmental Assessment Act which give
19 the Board that power.

20 Just for your information, I'm sure you
21 are already aware of the provisions of Section 12(2) of
22 the Environmental Assessment which set out the Board's
23 power in this regard.

24 From a practical perspective, what the
25 Federation seeks is not only the ability to challenge

1 the stated purpose of the undertaking as being too
2 narrowly defined and to have this Board amend that
3 purpose, what it seeks is the ability to present
4 evidence demonstrating that the purpose, as it is
5 currently defined, is too narrowly defined and that it
6 unreasonably excludes a consideration of appropriate
7 range of objectives.

8 The purpose, as stated in the
9 environmental assessment, is basically a single
10 objective. What the Federation seeks and will seek
11 through its evidence is to expand that purpose to
12 accommodate a multi-objective approach, and I will
13 discuss the implications of that.

14 I should tell the Board that we are not
15 seeking to change the undertaking; what we are seeking
16 to do is to ensure that the evidence presented by the
17 Federation on the many objectives to be accomplished by
18 the undertaking are truly relevant to this hearing.

19 Just to emphasize that point. The
20 Federation does not seek to change the undertaking to
21 expand the scope of this inquiry into the entire realm
22 of resource management in the Province of Ontario, what
23 it seeks simply is to expand the purpose to accommodate
24 a multi-objective approach to this undertaking.

25 THE CHAIRMAN: Well, just stopping right

1 there for a moment, Mr. Dahme. Is it your view that
2 the undertaking is a means of carrying out the purpose?

3 MR. DAHME: Yes, it is.

4 THE CHAIRMAN: And if the purpose is
5 expanded to be greater or something other than as
6 defined by the proponent in this case, how does that
7 impact upon the ability of the activities comprising
8 part of the undertaking to carry out that purpose?

9 MR. DAHME: The focus of those
10 activities, if the undertaking remains defined as this
11 single objective, is on the maintenance of the values
12 associated with that single objective and in deciding
13 on specific issues the focus is on that objective.

14 The undertaking has not changed. All we
15 are seeking to do is to redefine the purpose to put
16 another complexion on the evidence, if you will. It
17 doesn't change any of the evidence as it relates to the
18 proponent and what they have submitted in terms of the
19 undertaking.

20 What it is is it seeks and what the
21 Federation will seek is to put a new complexion on that
22 evidence to indicate that there is simply more than one
23 value that must be addressed, that there are a series
24 of values that have to be addressed by this undertaking
25 and that the predominant value is not simply the value

1 of timber, that there are other values that need to be
2 considered in the undertaking.

3 THE CHAIRMAN: Are you going to be
4 advising the Board as to what you would like to see the
5 purpose amended to?

6 MR. DAHME: Yes, I am prepared do that,
7 Mr. Chairman.

8 Now, this Board has recently ruled that
9 it may redefine the undertaking itself and it has done
10 that by redefining the undertaking as a planning
11 process as opposed to simply the activities --

12 THE CHAIRMAN: Well, with respect, I'm
13 not exactly sure that that's what that order stood for.

14 MR. DAHME: Okay.

15 THE CHAIRMAN: You may wish to read that
16 into that order, but I would suggest that the Board in
17 reviewing that matter, after considerable argument and
18 submissions, was more of the view that the Board was
19 defining the undertaking in terms of what had actually
20 occurred in terms of what the proponent had presented
21 by way of evidence to that point.

22 And it might be analogous to - if I might
23 use some corporate legal terms - piercing the corporate
24 veil, in the sense that you may wish to call it
25 something else but de facto it might represent a

1 particular situation, and the Board felt in that
2 particular case - without using the word misdescribed -
3 that perhaps it had been characterized by the proponent
4 differently than what the evidence supported from the
5 outset of this case.

6 And also you must, Mr. Dahme, bring into
7 consideration the concept of a class environmental
8 assessment and the statutory basis for such in the Act.
9 I think it is stretching it to try to place an
10 interpretation on that order that the Board can,
11 unfettered, redefine the undertaking for the proponent.
12 I don't think that's what that order stood for.

13 MR. DAHME: Okay. I'm sorry if I was
14 misunderstood, I wasn't seeking to ask this Board to
15 expand its powers.

16 The way I understood the order is the
17 same way that you have described it, Mr. Chairman, that
18 it reflects the evidence that has been heard at this
19 hearing and that it is a revised description, if you
20 will, of the undertaking and that is precisely what we
21 seek to do in terms of the purpose.

22 It is not redefining it in the way in
23 which I was perhaps misunderstood, it is to redescribe
24 it in a way which more accurately reflects all of the
25 evidence at this hearing currently and also to

1- redescribe it to accommodate the evidence that is
2 proposed to be introduced by the Federation.

3 It is not a wholesale amendment in the
4 sense of telling the proponent what activity they are
5 involved in, it is a redescription, if you will, of
6 that purpose to more broadly reflect the evidence that
7 is produced at this hearing.

8 And I think that is a key point, that it
9 is simply to accommodate all of the evidence that is
10 introduced. That is what we are seeking to do, to
11 redescribe the purpose of the undertaking in a fashion
12 which takes into account all of the evidence and which
13 will take into account the evidence that we will be
14 introducing.

15 It is not, let's say in the case of a
16 private proponent, telling them that they are involved
17 in some other activity which they may not have
18 contemplated; it is simply describing the purpose in
19 another fashion.

20 The reason that the Federation seeks this
21 ruling on this question of purpose is that it will
22 assist the Federation in advance of presenting its
23 evidence in determining how to best present that
24 evidence, having regard to issues such-as relevancy to
25 the stated purpose before this Board.

1 Disputes as to relevance could arise if
2 the undertaking as currently described remains
3 described in that fashion as that single objective, not
4 taking into account the other objectives that we will
5 seek to be pursued, not taking into account the
6 complexion that the Federation seeks to put on the
7 alternatives to the undertaking and the alternative
8 methods to the undertaking.

9 THE CHAIRMAN: Will the redescription
10 have a direct bearing on the impacts which will result
11 from the activities to be carried out by the proponent
12 as described in the evidence?

13 MR. DAHME: Yes, it will.

14 THE CHAIRMAN: Then will not the concerns
15 of the Federation relating to those impacts (a) be
16 relevant and, (b) can they not be addressed
17 appropriately through conditions of approval?

18 MR. DAHME: Mm-hmm. The problem with
19 that, Mr. Chairman, is that this undertaking is a
20 planning process and, as such, it will create a set of
21 values to be addressed in that planning process.

22 If the purpose remains as currently
23 defined, the focus continues to be on that one single
24 objective of timber management, and certainly the
25 evidence would be relevant and it would be argued that

1 the evidence is relevant; however, there would be a
2 different impact, I would submit, that it would not be
3 considered in the case of future timber management
4 plans as being important that there are these other
5 factors that need to be considered along with simply
6 providing a supply of timber.

7 THE CHAIRMAN: But why wouldn't that be
8 the case if they are addressed specifically in
9 conditions of approval?

10 Why, if a condition of approval were such
11 that you shall take into account wildlife concerns - I
12 am not wording a condition - but, for example,
13 wildlife concerns including things like the Fisheries
14 Guidelines, Moose Habitat Guidelines, et cetera, as a
15 specific condition of approval to allowing the
16 proponent to carry out the named activities, why does
17 that not protect those other values, so to speak, in
18 the formulation of a timber management plan?

19 MR. DAHME: It does protect those values,
20 but the concern is that without knowing the Board's
21 position in advance on questions such as that the
22 Federation remains uncertain as to how the Board might
23 consider the relevance of the evidence that are
24 proposed to introduce.

25 THE CHAIRMAN: Well, would you not agree,

1 Mr. Dahme - and I know you haven't been present
2 throughout the whole hearing - but there has been
3 considerable evidence before the Board arising out of
4 both the direct evidence and cross-examination to this
5 point on the impacts of those various activities such
6 as harvest, renewal, et cetera, on other values such as
7 wildlife, tourism, et cetera, and it has never been
8 suggested - at least if it has been suggested the Board
9 has rejected it - that that type of evidence is
10 irrelevant to this proceeding and, in fact, a review of
11 the proponent's draft conditions of approval would
12 indicate that those values are to be taken into account
13 and are to be the subject of conditions of approval
14 even as proposed by the proponent.

15 MR. DAHME: I see what you are saying,
16 Mr. Chairman. I suppose what I am attempting to argue
17 before the Board is that similar to the fashion in
18 which the undertaking has been redescribed, what we are
19 seeking to do simply is to redescribe the purpose in
20 the same fashion to accommodate that kind of evidence,
21 to accommodate those terms and conditions if they are
22 imposed by the Board.

23 THE CHAIRMAN: Well, I suppose we should
24 wait before commenting further to find out what your
25 proposal for amending the purpose is.

1 MR. DAHME: Okay. I guess I have
2 addressed to some extent the practical consequences
3 relating to the evidence of the Federation and I can
4 certainly understand your position, Mr. Chairman, but
5 it was the view of the Federation that by leaving the
6 purpose defined as it is currently the ability to
7 question the undertaking by the opponents is somewhat
8 limited.

9 The view of the Federation is that
10 questions of relevance might arise; the ability of the
11 opponents to question the proponent's range of
12 alternatives to the undertaking is limited, that is a
13 matter of general application of the Environmental
14 Assessment Act; the ability of the opponents to bring
15 evidence showing that a wider range of alternatives
16 should have been examined had the purpose been properly
17 identified is constricted - and, again, that is a
18 matter of wider application quite apart from this
19 hearing, that is a matter of wider application - and
20 last of all, the ability of the opponents to bring
21 evidence relating to the proper emphasis of the
22 undertaking might be restricted.

23 And, again, having not been party to
24 these hearings, I understand that there has been
25 evidence on those other objectives; however, the focus

1 of the Federation is to seek some ruling of the Board
2 in advance on the type of emphasis that might be
3 brought to bear on the purpose, that might be brought
4 to bear on the evidence that they propose to bring.

5 THE CHAIRMAN: Well, would you not also
6 agree though, Mr. Dahme, take any party with a specific
7 named interest and obviously the focus of their
8 evidence would likely address matters more of concern
9 to them than necessarily other parties or even the
10 proponent. So obviously if the purpose was defined by
11 the Federation and not by MNR, then I would suggest
12 that the purpose would take into account, to a large
13 extent, your client's concerns?

14 MR. DAHME: Mm-hmm.

15 THE CHAIRMAN: But turning that around,
16 it is the proponent's application before the Board.

17 MR. DAHME: Yes.

18 THE CHAIRMAN: It is the proponent that
19 is seeking to carry out certain activities in the
20 context of a planning process and so, consequently, it
21 is not at all surprising, for instance, to the Board
22 that the purpose of the undertaking as described by the
23 proponent is in the context of the proponent's
24 objectives.

25 MR. DAHME: Yes.

1 THE CHAIRMAN: That doesn't necessarily
2 mean though that other environmental values should not
3 and are not taken into account and should not and will
4 not be addressed in conditions of approval.

5 MR. DAHME: It is just that emphasis on
6 that single objective, Mr. Chairman, that gives rise to
7 concern. Perhaps I should go on to put this into
8 context.

9 I do not disagree that it is the
10 proponent's job to describe the purpose of the
11 undertaking to fulfill the basic requirements of
12 Section 5(3). It has the responsibility of defining
13 that purpose, but the purpose of the undertaking does
14 change over time.

15 In the process of conducting an
16 environmental assessment, a proponent may very well
17 begin with a very broad purpose, that purpose may
18 become more constricted with time to reflect the actual
19 undertaking at the time that the environmental
20 assessment is completed.

21 Similar to the way in which the
22 undertaking may be redescribed to reflect the evidence,
23 the purpose may also become redefined in a similar
24 fashion. And the decision of the Board that I would
25 like to refer to - and I recognize that it is certainly

1 not binding on this Board in that regard - is the SNC
2 decision, the Petro-Sun/SNC decision where basically
3 what the Board found was that although the proponent
4 had described the purpose in a particular fashion,
5 basically to make money by establishing -- making money
6 by selling electricity, the Board found that the
7 purpose had to be redefined taking into account some of
8 the effects and the principal effect was on waste
9 management, that it was in the Board's view a waste
10 management undertaking, it was an energy from waste
11 facility.

12 So although the proponent's purpose as
13 they defined it basically was to make money, that was
14 inadequate, that the purpose had a number of other
15 objectives from the perspective of the Region of Peel
16 which is responsible for waste management. The Region
17 of Peel said: Well, this is great, it solves one of
18 our waste management problems.

19 One of the advantages of the undertaking
20 was that it was a partial solution to a waste
21 management problem, but it was also perceived by the
22 Board as being one of the, if you will, hidden
23 objectives of that undertaking was to deal with an
24 aspect of waste management and the purpose was
25 redefined by the Board to accommodate that.

1 THE CHAIRMAN: But was not part of the
2 problem again - and I say this with some care because
3 obviously I wasn't a party to those proceedings - and
4 to the best of my recollection having reviewed the
5 decision in that proceeding, was not part of the
6 problem that in putting forth the application one of
7 the impacts arising from the production of energy was
8 the production of some residue waste, for instance, fly
9 ash arising from the incineration process and, as a
10 result, that wasn't carried through totally in the
11 context of a waste management plan for the area.

12 In other words, if you have an
13 undertaking that has an impact and you want approval
14 for that undertaking, you may have to go further and
15 decide what that impact is and how it will be
16 appropriately addressed.

17 And if in the context of an energy from
18 waste facility some care isn't also given to the
19 disposal of the waste as well and how that disposal
20 fits into a waste management plan, if one is in the
21 offing for that particular region, that is something
22 that should be addressed appropriately in the context
23 of the overall application.

24 So there is some difficulty in defining
25 that particular purpose because it has that two-fold

1 aspect to it; it is not just the production of energy
2 using waste as the input, it is also the disposal of
3 some of the output incidental to the production of the
4 energy which is, I believe in that case the fly ash, it
5 had to be landfilled somewhere or disposed of
6 appropriately. And I am not sure that consideration in
7 that application of those questions in terms of the
8 environmental assessment was made at the outset.

9 I may have it wrong, but that was one of
10 the aspects in my recollection involving that case.

11 MR. DAHME: Okay. That's not my
12 understanding, Mr. Chairman.

13 What that application involved was an
14 agreement between the Region of Peel and Petro-Sun
15 whereby the Region of Peel would provide municipal
16 solid waste to Petro-Sun for incineration. Petro-Sun
17 agreed to construct this facility and to seek the
18 necessary approvals.

19 There is waste generated at the end of
20 that energy production, but that was addressed and it
21 was addressed not necessarily within the context of
22 waste management, the question of fly ash was deemed to
23 be dealt with through the new requirements of the
24 Ministry of the Environment which require treatment or
25 disposal in a secure landfill or hazardous waste

1 landfill and the other residue was to be dealt with by
2 ordinary landfilling.

3 What the Board seemed to be more focused
4 on was not the residue at the end of the process, but
5 the fact that what it accomplished was to satisfy part
6 of Peel's waste management master plan which identified
7 energy from waste as a key component of that master
8 plan. The Board felt that unless the purpose of the
9 undertaking was redefined there would be no discussion
10 of waste management alternatives.

11 The Board also felt that unless the
12 purpose was redefined, then there would be nothing to
13 prevent other municipalities from simply contracting
14 out their responsibilities and not having undergo
15 full-scale reviews of waste management master plans,
16 that only by redefining the undertaking do all the
17 issues related to waste management in that case come
18 before the Board.

19 So all of the issues related to
20 recycling, to resource recovery, the range of issues to
21 be dealt with in a waste management undertaking could
22 only come before that Board and be taken as a serious
23 consequence of the undertaking if the purpose of the
24 undertaking was redefined to accept that.

25 The purpose of an undertaking defines the

1 scope of the alternatives to the undertaking. So if
2 the undertaking is simply defined as making money by
3 producing electricity, it defines the alternatives to
4 the undertaking. The undertaking is to produce
5 electricity, the alternatives to the undertaking are to
6 make money by conserving electricity, by transmitting
7 energy from another source.

8 The purpose defined what the alternatives
9 to the undertaking were and restricted the
10 consideration of alternatives to just those areas,
11 conservation and transmission; and, indeed, that was
12 the view of the Ministry of the Environment at that
13 hearing.

14 Mr. Brian Ward, who was then Director of
15 the Environmental Assessment Branch, and Ms. Peggy
16 Farnsworth, who was the environmental planner, appeared
17 at that hearing and argued that in fact those were the
18 alternatives to that undertaking, they were extremely
19 limited and they were simply transmission or
20 conservation. They were outside the business mandate
21 of the proponent and they did not need to be addressed
22 and, therefore, the proponent evaded the responsibility
23 of reviewing alternatives to the undertaking.

24 The view expressed on behalf of the
25 coalition which appeared in opposition and expressed

1 through the evidence of Mr. Emond and Mr. Bob Gibson
2 was that you could not arbitrarily restrict the
3 examination of alternatives to the undertaking by
4 defining the purpose in such a narrow fashion, that you
5 had to look at what the impacts were and that you had
6 to say to yourself: The purpose needs to be redefined
7 to accommodate those impacts, to accommodate the
8 evidence relating to those impacts. And the suggestion
9 was on behalf of the coalition that the purpose be
10 redefined and that it, in fact, be termed a waste
11 management undertaking in addition to the purpose being
12 simply to make money by producing electricity.

13 As a consequence of that the proponent
14 was required to introduce evidence on all of the waste
15 management alternatives; that is to say, resource
16 recovery, recycling, landfill. It broadened the scope
17 of the inquiry and, in fact, the only reason that the
18 proponent obtained approval was that the Region of Peel
19 presented evidence on its waste management master plan
20 showing that those alternatives had been examined and
21 that the energy from waste facility was one of those
22 alternatives which fit into that overall waste
23 management strategy.

24 So, in other words, in that case the
25 purpose was redefined to consider what the impacts

1 were, recognizing that unless that was done the
2 alternatives to the undertaking would be arbitrarily
3 restricted and that, in fact, a considerable area of
4 evidence would be excluded from consideration, that it
5 would be irrelevant.

6 And although I appeared on behalf of the
7 Region of Peel in that case, I think we have to accept
8 that that is a reasonable interpretation, that a
9 proponent could define the purpose narrowly in order to
10 avoid a broad examination of alternatives. And what
11 that would accomplish, if that is to be permitted, is
12 that restriction of alternatives and it would defeat
13 the purpose of the Act, which is the betterment of the
14 people of Ontario.

15 The purpose of the Act requires an
16 examination of the environment in that broad sense as
17 defined within the Act in order to arrive at what is
18 for the betterment of the people of Ontario.

19 A restriction of the purpose, which in
20 turn restricts the alternatives to the undertaking and
21 finally alternative methods to, will have the effect of
22 evading part of that responsibility that is placed on
23 the proponent under the Act, it evades some of the
24 responsibility to examine the full scope of the
25 environment in an effort to achieve what is for the

1 betterment of the people of Ontario.

2 So it is in that context which provides a
3 practical illustration, if you will, of what effect
4 there is of limiting the purpose, that we ask that the
5 purpose in this case be amended. There are the
6 practical consequences.

7 Now, again in the factum of the
8 Federation there are also some references to the
9 decision of the Joint Board, the panel sitting on the
10 Southwestern Ontario Hydro hearing, where they appeared
11 to accept that the purpose is plastic, that it changes
12 during the course of the hearing to accommodate the
13 evidence that is presented during that hearing. It
14 does not change the undertaking.

15 Similar to Petro-Sun, the undertaking
16 which was accepted by the Board was an energy from
17 waste facility, that was the undertaking, to construct
18 an energy from waste facility. It does not affect what
19 the undertaking is, but it affects the type of evidence
20 that is introduced in respect of that undertaking and
21 the relevance of that evidence.

22 Certainly this Board has accepted
23 evidence on a range of other objectives and impacts in
24 terms of the timber management activities being
25 proposed, but to fully accommodate that evidence, to

1 fully accommodate the evidence that will be proposed to
2 be presented by the Federation the purpose must be
3 modified to look at what those impacts are, to accept,
4 if you will, a multi-objective approach instead of that
5 single objective approach that is currently being
6 pursued.

7 The purpose can change. Although the
8 proponent defines it initially the purpose can change,
9 and this Board, pursuant to its powers under Section
10 12(2), does have the opportunity in accordance with its
11 powers to accept, amend or accept the undertaking, it
12 has the power to amend that purpose. In the fashion
13 similar to amending the environmental assessment to
14 accommodate all of the evidence that is presented at
15 the hearing, this Board has that same power in respect
16 of the purpose.

17 I think the Board can appreciate that
18 there are some specific concerns that are being raised
19 here on behalf of the Federation. I am also trying to
20 raise for the Board's consideration that broader
21 perspective. What the Federation seeks is a ruling
22 that is not in the abstract but that takes into account
23 the powers of this Board in respect of the
24 Environmental Assessment Act such as in the Petro-Sun
25 case where it could have resulted in an arbitrary and

1 unreasonable exclusion of certain considerations, waste
2 management considerations. What we are seeking is a
3 ruling from this Board that will set that issue to rest
4 so that in the future other opponents and proponents
5 are aware of, if you will, what is up for grabs. That
6 the proponent's purpose as stated is not the ultimate
7 purpose of the undertaking.

8 What we are seeking is a ruling that
9 although it has application to this hearing, it also
10 has application to the way in which proponents and
11 opponents generally approach environmental assessments.
12 It determines, let's say from the outset, an opponent's
13 strategy in approaching an undertaking, it determines
14 the type of evidence that they can introduce, it
15 determines in advance of that evidence, at least in the
16 opponent's mind, how the Board might treat that in
17 terms of relevance.

18 THE CHAIRMAN: But, Mr. Dahme, if the
19 proponent describes a purpose as the proponent sees fit
20 in relation to the undertaking it's putting forward,
21 constructs its case accordingly, presents its evidence
22 up to this point in time which, as you are aware, is
23 sort of half time.

24 MR. DAHME: Mm-hmm.

25 THE CHAIRMAN: The proponent having

1 presented its case, we are now ready to entertain the
2 Industry's case and then those parties in opposition,
3 including your client. How do you propose if the
4 purpose were amended in accordance with what you are
5 going to suggest to the Board, I assume shortly, that
6 the proponent respond to that amended purpose in terms
7 of and in the context of the 17 witness panels over the
8 course of some 20 months that it has already addressed?

9 MR. DAHME: I believe, Mr. Chairman, that
10 some of these issues have already arisen in
11 cross-examination and, accordingly, have already been
12 dealt with partially through the evidence.

13 THE CHAIRMAN: No, but surely, Mr. Dahme,
14 a proponent or any party should not be expected to
15 respond to matters raised solely because those matters
16 have been raised in cross-examination.

17 MR. DAHME: Mm-hmm.

18 THE CHAIRMAN: And then, accordingly,
19 their re-examination having been confined by the rules
20 to what was raised in cross-examination. Surely any
21 proponent or party putting its position before the
22 Board has the right, and should have the right, to put
23 in direct evidence at the outset prior to it being
24 cross-examined in an unfettered fashion in order to
25 meet what it perceives to be its statutory obligations.

1 MR. DAHME: Mm-hmm. I would agree with
2 you, except if we are to accept that at face value,
3 then what is to prevent a proponent from, as I have
4 indicated, arbitrarily confining the purpose of the
5 undertaking to limit the scope of the investigation.

6 The purpose of an environmental
7 assessment is to examine the entire scope of the
8 environment from the perspective of the betterment of
9 the people of Ontario. If what you are suggesting is
10 true, then a proponent could limit the scope of that
11 investigation and, thereby, defeat the purpose of the
12 Act.

13 THE CHAIRMAN: Well, but I would suggest
14 to you as well that were the same questions addressed
15 at the outset of a hearing and an appropriate ruling
16 sought on that at the outset of the hearing, then
17 depending on which way the Board ruled, the evidence
18 could be structured accordingly.

19 Now, a similar question - and I say
20 similar, it's not identical - but, as you are probably
21 aware from consultation with your client, we did have
22 some debate at the outset of this hearing as to what
23 constituted the description of the undertaking in the
24 context of either timber management or forest
25 management, and I think you probably have been advised

1 or can appreciate that there was some considerable
2 concern put forward by some of the parties, including
3 your client as one of the primary parties, over the
4 fact that this undertaking was not described in the
5 context of forest management in its wide resource
6 context as opposed to the more narrow context of timber
7 management relating to the specified timber management
8 activities.

9 Now, we had that debate at the outset.
10 The Board ruled at the outset effectively that it was
11 considering this application in the context of a timber
12 management proposal with activities relating to timber
13 management but dealing fully with the impact of those
14 activities on other values. Because there was some
15 concern at the outset, as you can appreciate, that if
16 this undertaking was dealing with forest management in
17 its broadest context that, in effect, you would have to
18 have alternatives to each type of resource value out
19 there: If part of the forest management were the
20 management of wildlife, you would then have to possibly
21 have alternatives to that undertaking, to the way
22 wildlife itself is managed, as well as to the way the
23 timber resource is managed, as well as the way the
24 tourism resource is managed, and every other use of the
25 forest.

1 And, quite frankly, the Board shutters at
2 what that could mean in terms of an overall hearing,
3 because we are dealing with the timber management
4 impacts, both positive and negative on these other
5 resources, and we are already almost two years down the
6 track. If we had to deal with each and every other
7 resource in the forest, including timber management and
8 the timber resource, I would suggest to you it would
9 make a hearing that is totally beyond the capacity, not
10 only of the Board to deal with in any kind of rational
11 fashion, but for any party out there to deal with in
12 any kind of rational fashion in terms of presenting
13 evidence, cross-examination, holding a formalized
14 structured hearing.

15 MR. DAHME: I agree with you, Mr.
16 Chairman. I mean, I can just imagine how awful it
17 would be to sit here for 10 years to listen to all
18 this.

19 But that is not the intention of the
20 motion. The intention of the motion is to have the
21 Board recognize that, yes, the undertaking focuses on
22 timber but that there has to be, within the context of
23 the planning process that relates to timber management,
24 not only the consideration of supplying timber but
25 other considerations, other factors that need to be

1 considered.

2 Now, not that we are requiring strategic
3 plans for fisheries in Ontario to be implemented today,
4 or not that we are requiring wildlife management plans
5 to be implemented as a result of this hearing, but that
6 the considerations that apply from those various types
7 of plans be before the Board in determining how to best
8 manage that timber resource.

9 THE CHAIRMAN: Well, without beating
10 around the bush any further, could we invite you to get
11 to the stage where you are going to present your
12 suggested amendment so that we can look at--

13 MR. DAHME: Sure.

14 THE CHAIRMAN: --all of this in the
15 context of what that proposal is.

16 MR. DAHME: It is two-fold. This is just
17 a summary of what it is, and it will be included in the
18 terms and conditions that are going to be put forward
19 by the Federation. It is, first of all, to provide a
20 predictable supply of resource benefits from the forest
21 estate through management of the forest structure.

22 THE CHAIRMAN: Just a second, we have to
23 write this down. To provide a predictable supply
24 of...?

25 MR. DAHME: Of resource benefits from the

1 forest estate through management of the forest
2 structure; and the second aspect is to strive for an
3 optimum mix of resource benefits.

4 THE CHAIRMAN: To provide an optimum
5 mix...?

6 MR. DAHME: To strive for--

7 THE CHAIRMAN: Oh, sorry. To strive for.

8 MR. DAHME: --an optimum mix of resource
9 benefits.

10 Now, what that purpose as we seek to have
11 it redescribed does is: It recognizes that the focus
12 of this hearing is on timber, but it also focuses
13 attention on other factors to be considered within the
14 planning process which is the undertaking; that when it
15 comes time to implement timber management plans on a
16 more specific level, there is an adequate consideration
17 of multiple objectives.

18 Now, in that sense the undertaking is the
19 same, it is the undertaking that is as defined and as
20 you have ruled, but it puts a complexion on that
21 planning process which will have consequences on the
22 more specific level, on the timber management plan
23 level.

24 THE CHAIRMAN: Well, what do you suggest
25 the proponent might have done differently in the

1 context of presenting their case had that purpose been
2 in place from the outset? Would their case have been
3 as presented?

4 MR. DAHME: I think it would have been
5 the same.

6 THE CHAIRMAN: And you would expect them
7 to rely on the way in which they structured their case
8 using the definition that they chose of purpose in the
9 same way?

10 MR. DAHME: I don't know that my answer
11 means anything since I haven't been here.

12 THE CHAIRMAN: Well, perhaps Mr. Freidin,
13 when it gets to be his turn, or Ms. Blastorah will
14 indicate whether they agree with your submission that
15 it might have been the same.

16 MR. DAHME: Yes.

17 THE CHAIRMAN: I would be frankly
18 surprised if they agreed to that, but stranger things
19 have happened in the course of hearings. So we will
20 wait and see.

21 MR. DAHME: Okay.

22 Those are all of my submissions, Mr.
23 Chairman.

24 THE CHAIRMAN: Okay.

25 Well, ladies and gentlemen, we are going

1 to have to take a short break, I have to respond to a
2 message, for 20 minutes, and then we will come back and
3 hear from I guess Mr. Cosman, we will go with you.

4 MR. COSMAN: Mr. Chairman, I guess it
5 would be those in support who are supporting the motion
6 would go first.

7 THE CHAIRMAN: All right. That will be
8 Mr. Lindgren next.

9 MR. LINDGREN: Correct.

10 THE CHAIRMAN: Then we will follow with
11 Mr. Cosman, probably the Ministry, and then --

12 MR. FREIDIN: MOE, and then the Ministry.

13 THE CHAIRMAN: Yes.

14 MS. BLASTORAH: No.

15 THE CHAIRMAN: No, the Ministry of the
16 Environment I think will come before MNR.

17 MS. BLASTORAH: Before MNR.

18 THE CHAIRMAN: Before MNR, so that you
19 have the advantage--

20 MS. BLASTORAH: Yes.

21 THE CHAIRMAN: --since you have to
22 respond and it is your purpose to respond to everyone
23 in this case.

24 MS. BLASTORAH: Thank you, Mr. Chairman.
25 - I concur with that suggestion.

1 THE CHAIRMAN: Thank you. We will be
2 back in 20 minutes.

3 ---Recess taken at 10:55 a.m.

4 ---On resuming at 11:20 a.m.

5 THE CHAIRMAN: Thank you. Be seated,
6 please.

7 MR. DAHME: So, Mr. Chairman, if I may, I
8 just have two additional points that perhaps can put
9 some of this discussion into focus.

10 The first is that although we have been
11 discussing this particular case and the evidence before
12 you, what we are seeking is a ruling of general
13 application, which is to say on the jurisdiction of
14 this Board to amend or redescribe the purpose of the
15 undertaking.

16 THE CHAIRMAN: Well, I can appreciate
17 that rulings of the Board, in view of the Board's
18 desire to be consistent where possible, may have
19 implications with regards to future cases, but you can
20 appreciate, Mr. Dahme, that we have to decide any
21 particular motion on the facts of the case before us
22 and the implications of any ruling on the case before
23 us.

24 MR. DAHME: Yes.

25 THE CHAIRMAN: And that is the way we

1 have decided all of the rulings in connection with this
2 particular application, and I suggest that is the
3 proper way to decide rulings in the context of a
4 specific application.

5 MR. DAHME: And just the last point was
6 in respect of your question as to whether or not the
7 proponent would have presented their evidence any
8 differently. I should just refer to the SNC case where
9 the proponent did not present their evidence in any
10 fashion that was different than what they had
11 anticipated.

12 THE CHAIRMAN: Well, that was a very
13 different case, I would suggest--

14 MR. DAHME: Yes.

15 THE CHAIRMAN: --than the one that is
16 before us.

17 MR. DAHME: Thank you, Mr. Chairman.

18 THE CHAIRMAN: Thank you.

19 Very well, Mr. Lindgren?

20 MR. LINDGREN: Before I begin, Mr.
21 Chairman, I have a book of authorities that I would
22 like to file with the Board.

23 THE CHAIRMAN: Very well.

24 MR. LINDGREN: (handed)

25 I should indicate, Mr. Chairman, that I

1 don't anticipate referring to the book of authorities in
2 any great detail, but I did want to provide those to
3 the Board and to the parties.

4 Mr. Chairman, despite the comments that
5 you have just made I will limit my submissions to the
6 general jurisdictional issues raised by this motion.
7 In our factum we have referred to the purpose of this
8 undertaking in order to give our submissions some
9 context, and this morning we have heard Mr. Dahme's
10 proposal about revising the purpose. However, we will
11 not be making submissions on how the purpose of this
12 undertaking should be amended or whether it should be
13 amended at all.

14 THE CHAIRMAN: Are you going to indicate
15 whether or not you are in support of Mr. Dahme's
16 proposed amendment?

17 MR. LINDGREN: Well, Mr. Chairman, Mr.
18 Dahme's proposal is certainly very interesting, but I
19 am not proposing to deal with it because, quite
20 frankly, it was not directly or specifically raised in
21 either the Notice of Motion or the order requested
22 portion of his factum. And I was going to go on to
23 make the submission, I don't think we have to take a
24 position on his proposed revision in order to make our
25 submissions and, therefore, for the Board to make its

1 ruling on this motion.

2 The motion, in our view, raises two
3 generic issues --

4 THE CHAIRMAN: Let's get this straight.
5 Are you indicating that you are just going to put
6 forward an argument, supposedly in support, as to the
7 Board's jurisdiction to amend the purpose to something
8 other than what was described by the proponent and that
9 you are not going to suggest, from the perspective of
10 your client, what that amended purpose should be, and
11 that you are not going to comment on the purpose as
12 proposed by OFAH?

13 MR. LINDGREN: That's correct, sir.

14 THE CHAIRMAN: And you are just going to
15 offer some moral support for OFAH in terms of the
16 general jurisdictional question for the Board's ability
17 to amend the purpose?

18 MR. LINDGREN: I would say it's more than
19 moral support, sir, I say it's legal and jurisdictional
20 support for that position.

21 I think perhaps the appropriate starting
22 point would be the order requested portion of the OFAH
23 factum. There very clearly two generic issues have
24 been raised. The first is whether or not the Board has
25 the jurisdiction to reject an environmental assessment

1 if the purpose is inappropriately formulated, that is
2 the first issue. The second is whether or not the
3 Board has the jurisdiction to amend the stated purpose
4 of the undertaking.

5 As I have indicated, Mr. Chairman, it is
6 our position that both of those questions can be
7 answered in the affirmative, and if they are answered
8 in the affirmative, then it follows that the OFAH or
9 any other party can lead evidence as to the
10 acceptability of the purpose as stated by the
11 proponent.

12 As I have also indicated, we would submit
13 that the questions can be answered in the affirmative
14 without necessarily determining whether or not the
15 purpose of this undertaking should be or can be amended
16 at this stage of the proceeding.

17 That issue, Mr. Chairman, has not been
18 raised by the Notice of Motion, it's not raised by the
19 order requested portion of the factum. As we
20 understand the OFAH position, they are seeking a ruling
21 from the Board as to whether or not it possesses
22 certain jurisdictional powers. It's not at this time,
23 as I understood it, specifically asking the Board to
24 exercise those powers. That is what I understood the
25 OFAH --

1 --THE CHAIRMAN: Well, are you not, Mr.
2 Dahme, requesting the Board, if it finds that it does
3 have the jurisdiction, to amend the purpose in
4 accordance with what you put forward?

5 MR. DAHME: No. The terms and conditions
6 that will be put forward by the OFAH will set out what
7 we will be seeking, but today I am not asking this
8 Board to amend the purpose to that definition.

9 THE CHAIRMAN: Well, okay. I mean, it
10 seems to the Board that we are -- I am not saying
11 wasting the Board's time, but it seems to the Board
12 that it is a very difficult proposition to put forward
13 to ask the Board to consider a jurisdictional question
14 as fundamental as this one; i.e., amending the purpose
15 as described by the proponent, suggesting what you
16 properly think the purpose should be in terms of
17 description, indicating that notwithstanding whether or
18 not the Board has the jurisdiction to amend it, you
19 propose to deal with those concerns by way of
20 conditions of approval in relatively the same context
21 had we bought the argument that the purpose should be
22 amended accordingly and, at the same time, not
23 requesting the Board, if it does have the jurisdiction,
24 to consider an amendment in those terms.

25 And then we have another party coming

1 forward, Forests for Tomorrow, indicating that it would
2 also like the Board to consider its jurisdictional
3 powers to amend the purpose of the undertaking, but
4 that it is not putting forward what the purpose should
5 or should not be and, presumably, it would be different
6 from that proposed initially by the proponent; and
7 somewhere in all of this the proponent is supposedly
8 being put into the position of having to respond, and
9 not only respond but respond in the context of: What
10 does that mean to the proponent in terms of how it has
11 presented its case for the last 20 months, assuming
12 that the purpose was as described by the proponent.

13 MR. LINDGREN: Mr. Chairman, I will be
14 addressing some of the practical implications if the
15 Board determines it does have that jurisdiction, but I
16 did not come here prepared to provide the Board or the
17 other parties with an alternative formulation of the
18 purpose because, quite frankly, that was not the issue
19 or issues that was raised by the Notice of Motion.

20 THE CHAIRMAN: All right.

21 MR. LINDGREN: Having said that, perhaps
22 I should address the first issue and I will attempt to
23 bring it from the general to the specific where I can.

24 THE CHAIRMAN: Well, I think we should
25 really address all arguments - and this is a direction

1 to all counsel - in the context of this specific case:
2 What does it mean in the context of this case, because
3 this case, as you are aware, is well underway and any
4 amendments of purpose at this stage will, in the
5 Board's view, have some very practical onerous
6 implications both in terms of where this hearing is
7 going and what may or may not be by way of prejudice
8 visited upon the proponent for having the purpose
9 changed at this stage of the proceedings.

10 So with those comments in mind, continue.

11 MR. LINDGREN: Thank you, Mr. Chairman.

12 Let me begin by addressing the first
13 issue which is: Does the Board have the jurisdiction
14 to reject an environmental assessment if the purpose is
15 improperly formulated. Our position on this issue is
16 summarized in paragraph 7 to 17 of our factum, and I
17 would like to briefly highlight some of these
18 paragraphs. I think it would be advisable for the
19 parties and for the Board to have our factum available
20 in order to follow our submissions.

21 THE CHAIRMAN: Do you have an extra copy
22 of that?

23 MR. LINDGREN: I have one extra copy,
24 sir.

25 MS. BLASTORAH: I have one extra as well.

1 MR. MARTEL: Mine is in Thunder Bay.

2 MS. BLASTORAH: Along with everything
3 else we all own.

4 MR. LINDGREN: (handed)

5 MR. MARTEL: Thank you.

6 THE CHAIRMAN: Thanks.

7 MR. LINDGREN: I would first refer the
8 Board to paragraph 6 of our factum found at page 2 and
9 you will see, Mr. Chairman, that we have framed the
10 first issue somewhat differently from the OFAH. We
11 posed the question as following:

12 Does the Board have the jurisdiction to
13 refuse to grant approval to proceed with
14 an undertaking if the Board finds that
15 the stated purpose of the undertaking is
16 unacceptable or unnecessary.

17 We did this, Mr. Chairman, because we are
18 unsure what the applicant meant by improperly
19 formulated and because it is conceivable that a purpose
20 may be properly formulated; that is, it properly
21 describes what the proponent wants to do, but it
22 nevertheless may be an unnecessary purpose or it may be
23 a purpose inconsistent with the Act and, for that
24 reason, could be rejected. And that was why we framed
25 the first issue slightly differently from the

1. applicant, and that is why our factum attempts to
2. elaborate on what we mean by the phrase 'unacceptable
3. or unnecessary'.

4. Now, turning to paragraphs 7 to 10 of our
5. factum on the next page, we set out several
6. straightforward propositions.

7. First, the environmental assessment must
8. contain a statement of purpose for the undertaking;
9. secondly, that the Board has the jurisdiction to accept
10. or amend and accept the environmental assessment;
11. thirdly, that the Board has the jurisdiction to approve
12. the undertaking and to impose terms and conditions
13. related to the undertaking; and, fourthly, that the
14. environmental assessment consists of the EA Document
15. and all oral and documentary evidence adduced at the
16. hearing.

17. Now, in our view, Mr. Chairman, those
18. propositions are self-evident, I don't think any of the
19. parties dispute them, but they do give us the necessary
20. starting point for our main submissions on the first
21. issue which commence at paragraph 11 of the factum.

22. And there, Mr. Chairman, we cite the
23. Joint Board's recent North Simcoe decision as authority
24. for the proposition that where an environmental
25. assessment is found to be inadequate, the Board may

1 reject the EA and may refuse to grant approval to the
2 undertaking.

3 Now, a portion of this decision is
4 reproduced in our book of authorities. I would refer
5 the Board to page 7 of our book of authorities, and at
6 the top of page 7, Mr. Chairman, the Joint Board found
7 that the environmental assessment in that case lacked
8 the basic combination of reasonableness, consistency
9 and systematic approach. And then further down that
10 page the Board begins its discussion of the two
11 distinct decisions that must be made under Section
12 12(2) of the Act, acceptance of an EA and approval to
13 proceed.

14 Now, continuing on to page 8 of our book
15 of authorities on the next page, and in the last
16 paragraph the Board holds that in relation to the
17 acceptance decision; that is, the decision to accept
18 the EA, the Board should have regard to the same
19 matters as the Minister under Section 8 of the Act;
20 namely, the purpose of the Act, the environmental
21 assessment and other matters. I will come to that in a
22 moment.

23 More importantly, the Joint Board -- on
24 page 9 and page 10 and 11 of the decision the Board
25 goes on to hold that Section 12(2)(c) gives the Board

1 the implied power not to accept the EA. In other
2 words, the Board has a third option of non-acceptance,
3 and non-acceptance itself is sufficient to finally
4 determine the issue without necessarily going to the
5 second decision regarding approval to proceed.

6 We strongly agree with this view, Mr.
7 Chairman, and the implications of this decision on this
8 motion are set out in paragraphs 12 to 14 of our
9 factum.

10 Our position is simply this: If an
11 environmental assessment is unsatisfactory for any one
12 of a number of reasons, such as an inadequate
13 discussion of alternatives to or alternative methods as
14 occurred in the SNC case discussed by Mr. Dahme, then
15 the Board is free to reject the environmental
16 assessment and it will be doing so because the EA is
17 not acceptable as a basis for making a decision on the
18 merits of the undertaking. This is a decision that is
19 separate and distinct from the decision concerning
20 approval to proceed according to the North Simcoe case.

21 Now, how does this fit into the purpose
22 of the undertaking and the answer, Mr. Chairman, is
23 self-evident in our view and, in this sense, we adopt
24 the submissions made this morning by Mr. Dahme on this
25 point. Where the purpose of the undertaking is defined

1 in an excessively narrow fashion, it is clear that the
2 range of alternatives to and alternative methods will
3 be similarly limited or restricted.

4 As we point out in paragraph 13 of our
5 factum, an environmental assessment restricted in that
6 fashion would significantly impair the Board's ability
7 to make a decision on the merits of the undertaking and
8 it would also, in the words of the SNC decision, make
9 the Environmental Assessment Act process meaningless.
10 We find similar comments -- similar language by the
11 Joint Board in the Southwest Hydro decision which I
12 have reproduced as page 32 of my book of authorities.
13 I don't intend to go to it, but that is the reference,
14 Mr. Chairman.

15 In our view, it follows that where an
16 environmental assessment is found to be inadequate by
17 reason of an excessively narrow definition of the
18 purpose of the undertaking, then the Board does have
19 the jurisdiction not to accept the EA and to refuse
20 approval to proceed.

21 Similarly, Mr. Chairman, where the Board
22 finds that the purpose has been improperly described in
23 that it does not accurately reflect what the proponent
24 wants to do, then again the Board has the jurisdiction
25 to reject the EA and to refuse approval.

1 This, again, is supported by the SNC
2 decision at page 23 of our book of authorities and we
3 note that the Ministry of Natural Resources in its
4 factum, paragraph 7, agrees with that proposition.

5 In paragraph 16 of our factum, we further
6 submit that where the purpose is found to be
7 unnecessary, in the sense that there is no justifiable
8 need for the undertaking, then again we submit that the
9 Board can reject the EA and refuse approval to proceed.
10 This is also true where the Board finds that an
11 alternative to the undertaking may be preferable.
12 Again, we note that the Ministry of the Environment
13 essentially agrees with this proposition at paragraph 5
14 of their factum.

15 Then finally returning to our factum,
16 paragraph 15, we submit that where the purpose of the
17 undertaking is inconsistent with the public interest as
18 described in Section 2 of the Act, then the Board can
19 reject the EA and refuse approval to proceed, and this
20 submission is really a variation of the one I just made
21 on need.

22 As you pointed out in the Redhill Creek
23 Expressway case, Mr. Chairman, if there is no need for
24 the undertaking it cannot be said that the undertaking
25 contributes to the betterment of the people of Ontario.

1 A similar proposition is found in the Highway 416
2 decision which I have included in my book of
3 authorities. That's found at pages 29 and 30.

4 THE CHAIRMAN: I don't think it was said
5 that it won't contribute to the betterment, it is not
6 likely to.

7 MR. LINDGREN: Very well.

8 THE CHAIRMAN: In certain circumstances
9 it may well.

10 MR. LINDGREN: The public interest is set
11 out in Section 2 of the Act and, as I have indicated
12 earlier, the North Simcoe decision suggests or upholds
13 that in determining whether or not the EA should be
14 accepted or rejected the Board should have regard to
15 the purpose of the Act. That's all I intend to say on
16 the very first issue.

17 Let me conclude by simply remarking that
18 the Board, in our view, does have the jurisdiction to
19 reject the EA and to refuse approval where the stated
20 purpose is unacceptably narrow or the purpose is
21 unnecessary or it's otherwise inconsistent with the
22 Act; and, therefore, in our view the answer to the
23 first issue can be answered in the affirmative.

24 The second and perhaps more problematic
25 issue is the second one; and, that is, whether or not

1 the Board has the jurisdiction to amend the purpose of
2 the undertaking and to accept the EA as amended.

3 As I noted at the outset, Mr. Chairman,
4 we submit that the Board does have this jurisdiction
5 subject to certain caveats that I will outline in a
6 moment and these caveats may be applicable in this
7 case. But, again, let me emphasize that we are not
8 arguing whether or not the purpose of this undertaking
9 can or should be amended at this stage. As I've
10 indicated, I think that is a matter for argument for
11 another day depending on the outcome of this motion.
12 Here, Mr. Chairman, we are only discussing whether, as
13 a matter of law, the Board has the jurisdiction to
14 amend the stated purpose of an undertaking and it is
15 our position that it does have that jurisdiction under
16 certain circumstances.

17 Let me begin, Mr. Chairman, by referring
18 to paragraph 18 of our factum and there very simply we
19 indicate that Section 5(3) of the Environmental
20 Assessment Act requires the EA to contain a description
21 of the undertaking. Again, very straightforward.

22 And as we know and as we have heard often
23 in this case, the court in the Ontario Hydro decision
24 has held that only the proponent describes the
25 proponent. However, the court did go on to clearly

1 recognize that the Board may approve an alternative
2 method of carrying out the undertaking that was not
3 considered or even preferred by the proponent and, if
4 that occurs, the proponent's choice is clear; it can
5 either accept or reject the approval as qualified by
6 the Board.

7 In paragraph 20 of our factum, we submit
8 that in approving an alternative method the Board may
9 effectively influence or affect the purpose of the
10 undertaking, particularly if terms and conditions are
11 attached to the approval. I readily can see that
12 paragraph is not worded as clearly as it should be. I
13 would like to offer an example that would perhaps
14 clarify that submission.

15 If, for example, we have an existing
16 factory that wants to build an EFW facility and the
17 stated purpose of the undertaking is to provide steam
18 energy to the factory and to others in the immediate
19 area; and, again, suppose the undertaking -- the
20 preferred means of carrying out the undertaking is to
21 use commercial waste generated by that factory and
22 other factories in the area, waste that is not normally
23 collected by municipalities, if the municipality was a
24 party to the hearing and if the municipality's evidence
25 suggested that the fuel source for the EFW should be

1 partially or completely municipal solid waste, then we
2 submit that it would be open to the Board to approve
3 the undertaking, but also approve the burning of the
4 municipal solid waste subject to any terms and
5 conditions that speak to this alternative method.

6 And so, for example, the Board could
7 impose a limit on the percentage or the annual amount
8 of the municipal solid waste to be burned, it could
9 require mandatory separation of the waste material
10 prior to burning to ensure that recyclable or hazardous
11 material is not burned. This would have the spin-off
12 effect of protecting any recycling initiatives that may
13 be underway in the municipality.

14 The point is this, Mr. Chairman: In this
15 scenario the purpose of the undertaking would still be
16 to provide steam energy, but the Board's approval and
17 the terms and conditions would ensure that the facility
18 serves a waste management or waste disposal purpose;
19 that is, if the company accepts the approval - now, the
20 company might not accept the approval - but if it does,
21 and if it does carry out the undertaking, the original
22 purpose, generation of stream energy, will have been
23 indirectly amended to include or serve a waste
24 management purpose. And if the Board can do that
25 indirectly through terms and conditions, then why can't

1- it do so directly through an amendment to the purpose.

2 THE CHAIRMAN: Well, Mr. Lindgren, I
3 think you have to take the pronouncement of the court
4 in the Ontario Hydro case in the context of realizing
5 that if the Board can approve a method of carrying out
6 the undertaking not preferred or even considered by the
7 proponent, that may give rise to some serious notice
8 problems.

9 MR. LINDGREN: I will be getting to those
10 notice problems, Mr. Chairman.

11 THE CHAIRMAN: And as a result the Board,
12 although it may wish to do so, may ultimately find out
13 that it has not got the appropriate parties who will be
14 impacted by the Board's decision in conditions of
15 approval before it, and that may create a whole host of
16 fundamental jurisdictional problems going right to the
17 heart of natural justice which may, in effect, end up
18 with the whole thing being aborted after the fact.

19 MR. LINDGREN: So you have anticipated my
20 very next line of submissions, Mr. Chairman.

21 But just to finish off what I've just
22 said, if the Board can indirectly influence the purpose
23 of the undertaking through the terms and conditions,
24 why, as a matter of principle, can't the Board be up
25 front about it and make or influence the purpose of the

1- undertaking through an amendment, or revise it via an
2 amendment as opposed to going through the back door,
3 using the guise of approving an alternative method and
4 imposing terms and conditions related to it.

5 That is the essential crux of that point,
6 the point I just made, that if the Board can do it
7 indirectly through terms and conditions, why as a
8 matter of principle can't they do it through an
9 amendment to the purpose up front?

10 THE CHAIRMAN: Why is there a necessity
11 of doing so by amending the purpose formally up front?

12 MR. LINDGREN: For the very reasons I
13 think properly spelled out by Mr. Dahme, it will have a
14 direct bearing on the types of evidence that can or
15 should be led by not only the proponent, but the other
16 parties. There are certain practical problems that
17 flow from that. I will get to those in a moment, Mr.
18 Chairman.

19 At this point I think it's fair to say
20 that most parties I think would agree that a change in
21 the purpose of the undertaking could come from the
22 proponent itself as the hearing evolves.

23 Now, as we indicated in paragraph 21 of
24 our factum, it has generally been recognized that the
25 EA hearing, the EA process is fluid and dynamic and

1 that the undertaking my change or evolve over the
2 course of the hearing, but as the Joint Board held in
3 the Southwest Ontario Hydro decision, where there is an
4 amendment the rules of natural justice will determine
5 the extent to which the assessment process has to be
6 repeated.

7 This is found at page 34 of our book of
8 authorities, Mr. Chairman. It might be necessary to
9 take a quick look at that statement. At the bottom of
10 page 34 the Board indicates:

11 "Amendments which result in an
12 undertaking of an entirely different
13 nature may require starting the process
14 from the beginning; whereas minor
15 changes to the undertaking may be made
16 without any further notice or repeating
17 any procedures."

18 We support that position, Mr. Chairman,
19 but we would also suggest that in addition to the rules
20 of natural justice, the Environmental Assessment Act
21 itself may require a second assessment if the amendment
22 to the undertaking has not been properly evaluated in
23 terms of alternatives, alternatives methods or the net
24 environmental impacts.

25 And in this sense, Mr. Chairman, the

1. environmental assessment process does play a large role
2 in controlling the purpose of the undertaking. If the
3 purpose is unacceptable for any of the reasons I
4 outlined earlier, then the Board can reject the EA and
5 it can refuse approval to proceed.

6 The question today, Mr. Chairman, is
7 whether or not there is some middle ground between
8 outright rejection and acceptance of the EA; and we say
9 yes to that question, Mr. Chairman, we say that the
10 middle ground is found in the Board's ability under
11 Section 12(2) to amend the EA in general and to amend
12 the purpose of the undertaking in particular.

13 Now, in support of this proposition, Mr.
14 Chairman, we would rely on the comments I just read
15 from the Southwestern Hydro case and I would also refer
16 to the SNC decision which is found at page 24 of the
17 book of authorities.

18 At page 24, top paragraph, the Board
19 held:

20 "The requirements for the description of
21 the undertaking and the purpose of the
22 undertaking should be consistent for
23 private and public sector proponents."

24 Then skipping the next line:

25 "To accept the suggestion that the

1- proponent's business mandate alone should
2 determine the definition of the purpose
3 of an undertaking could, in the Board's
4 view, lead to such narrow definitions of
5 purpose as to render the Environmental
6 Assessment Act process meaningless."

7 And then the first line of the next
8 paragraph indicates:

9 "The identification of alternatives to
10 the undertaking should be determined by
11 the purpose or the functions of the
12 undertaking and not by the purpose of the
13 business aims of the private proponent."

14 In other words, Mr. Chairman, the purpose
15 of the undertaking should be determined by the Board by
16 examining the objective facts; that is, by examining
17 the purpose of the function of the undertaking. And
18 where the purpose is determined in this manner and
19 where it is consistent or found to be consistent with
20 the purpose of the Act, the Board can accept the EA and
21 give approval to proceed; but where the purpose is
22 inconsistent with Section 2 of the Act, the proponent
23 may amend it subject to the notice requirements and the
24 Environmental Assessment Act considerations I've
25 mentioned and I will get to. That much is clear I

1 think, Mr. Chairman.

2 But We submit that it is possible to go
3 one step further; we submit that it is open to the
4 Board to amend the purpose where it is reasonable and
5 appropriate to do so.

6 Now, when will this occur, when will it
7 be appropriate or necessary or reasonable to amend the
8 purpose? Mr. Chairman, it is difficult to define these
9 circumstances with any precision, but we suggest that
10 the Board could amend the purpose where the evidence
11 demonstrates that an amendment more fully and more
12 properly reflects what the proponent wants to do or
13 where the amendment fully or more properly ensures the
14 protection, conservation and wise management of the
15 environment.

16 Let me offer an example perhaps relating
17 to this undertaking that might illustrate those
18 propositions. Now, suppose the purpose of this
19 undertaking was to allocate and harvest every stick of
20 wood in this province as soon as possible. I'm not
21 suggesting that's the case, it's a hypothetical, but if
22 that was the purpose of the undertaking, I think it
23 would be clearly open to the Board to reject that
24 - purpose on the grounds that it is inconsistent with the
25 public interest as set out in Section 2.

1 THE CHAIRMAN: Well, would not the
2 rejection be on the basis that after the Board weighed
3 the evidence put before us, the environmental impact,
4 taking into account the wide definition of environment
5 which automatically includes other values, is
6 unacceptable; to harvest every stick of the wood in the
7 -- province would likely leave wildlife without a forest--

8 MR. HANNA: A home.

9 THE CHAIRMAN: --or a home to live in, if
10 we can put it that way, and that is not environmentally
11 acceptable.

12 MR. LINDGREN: And it doesn't contribute
13 to the wise management, conservation or protection of
14 the environment.

15 THE CHAIRMAN: It is just not
16 environmentally acceptable and, presumably, it would
17 not be in the public interest.

18 MR. LINDGREN: That's right. But short
19 of rejecting that EA on that ground, we submit that it
20 should be possible for the Board to amend the purpose,
21 and one way to amend that purpose would be to have the
22 purpose read as follows: Allocate and harvest on a
23 sustained yield basis in an environmentally sound
24 manner.

25 THE CHAIRMAN: But what if what the

1 proponent is putting before us is the proposition: We
2 want to harvest every stick of wood in the forest.
3 That's what they want a decision on.

4 MR. LINDGREN: That's right.

5 THE CHAIRMAN: They are saying to the
6 Board: We have described the purpose, we want to
7 harvest every stick of wood in the harvest, we are
8 entitled under the Act for you to come up with a
9 decision as to whether that, in your view, is
10 environmentally acceptable and, if not, you have the
11 power to reject it or approve it subject to conditions
12 of approval. That's the question they want answered.

13 MR. LINDGREN: My argument, Mr. Chairman,
14 goes one step further. Short of rejections and/or
15 approval with terms and conditions, the Board may
16 choose to amend the purpose.

17 THE CHAIRMAN: Well, we may want to
18 choose to come up with a decision that says: We find
19 it unacceptable in terms of environmental impact to
20 allow every stick of wood in the forest to be
21 harvested, and we could reject the undertaking
22 outright.

23 I suppose we might be able to say: We
24 might approve an undertaking that would allow 60 per
25 cent of the forest to be harvested under certain

1 conditions. It would then be open for the proponent to
2 say: Well, we can't live with that, or we can live
3 with that, et cetera.

4 MR. LINDGREN: That's right. And it
5 would be up to the proponent to decide whether or not
6 it could live with that amendment. I would suggest
7 that's an amendment to the purpose of the undertaking
8 because it's no longer to allocate and harvest every
9 stick of wood, it is now 60 per cent.

10 THE CHAIRMAN: I would suggest that's an
11 approval subject to specific conditions which delineate
12 the impact, in the Board's view, the environmental
13 impact--

14 MR. LINDGREN: This brings me back--

15 THE CHAIRMAN: --or not acceptable
16 environmental impacts.

17 MR. LINDGREN: Sorry, Mr. Chairman. This
18 brings me back to the point I made earlier. If you're
19 doing it via an approval with terms and conditions, why
20 can't you do it directly through an amendment to the
21 purpose?

22 THE CHAIRMAN: Because that is not the
23 application that was put before us.

24 MR. LINDGREN: Well, Mr. Chairman, the
25 point I am trying to make is that if the stated purpose

1 was not acceptable and it is not in the public
2 interest, it's obviously open to the Board to reject
3 the purpose. I am saying that it --

4 THE CHAIRMAN: Reject the undertaking.

5 MR. LINDGREN: Or reject the undertaking.
6 If at that point considerable time, energy, months of
7 hearing have occurred, then it may well be in the
8 public interest to amend rather than reject the
9 undertaking outright, send the proponent back to the
10 drawing board to start from the beginning again, and I
11 would suggest that's particularly true where a
12 proponent is already carrying out the activities
13 subject to an exemption order.

14 In that case, we would submit that it is
15 not in the public interest to reject the undertaking or
16 the purpose of the undertaking holus bolus, it may be
17 in the public interest to amend it rather than send it
18 back.

19 THE CHAIRMAN: I am not sure how you can
20 take that quantum leap, Mr. Lindgren.

21 The reasons for putting in place an
22 exemption order or not are entirely matters within the
23 consideration of the appropriate authorities who have
24 the jurisdiction to do so; namely, the Cabinet, and
25 that may have nothing to do with whether or not it is

1 appropriate for the Board, because of an exemption
2 order being in place, to approve or reject an
3 undertaking that's before the Board pursuant to the
4 Environmental Assessment Act.

5 We have to be guided by the provisions of
6 the legislation apart, and separate and apart from any
7 exemption order.

8 MR. LINDGREN: I would suggest that the
9 Board would have to have regard to the exemption order
10 if it rejected or if it were of the mind to reject an
11 undertaking. If the exemption order were open-ended --

12 THE CHAIRMAN: I would suggest if the
13 Board rejected the undertaking outright, then other
14 parties would have to take into account the effect of
15 the exemption order; namely, the Cabinet.

16 MR. LINDGREN: Mr. Chairman, I've simply
17 tried to illustrate one situation where it may be
18 preferable to amend rather than reject.

19 Another situation may occur where the
20 amendment is relatively minor and does not
21 fundamentally alter the undertaking.

22 Again, we submit that it may be
23 reasonable to amend rather than reject, and this may be
24 possible without the requirement of providing further
25 notice or without further environmental analysis. That

1 I think is very clear from the decision of the Board in
2 the Southwest Hydro decision, the statement that I read
3 into the record earlier, and perhaps I could offer an
4 EFW scenario that helps illustrate that point.

5 In my earlier scenario the purpose was
6 defined as the production of steam energy, but if on
7 the facts the Board found that there was a waste
8 disposal purpose in that municipal solid waste could or
9 should be burned, then it may be reasonable for the
10 Board to find that the purpose is really two-fold,
11 energy production and waste disposal, despite what the
12 proponent had originally defined as the purpose and, as
13 Mr. Dahme indicated this morning, Mr. Chairman, that is
14 precisely what the Board did in the SNC case.

15 At page 23 of our book of authorities the
16 Board found that the undertaking itself is properly
17 described but towards the end of the page the Board
18 found that the purpose should have been described to be
19 two-fold, to dispose of waste and to produce energy.

20 And as we've heard this morning, Mr.
21 Chairman, the Board went on to find that the
22 alternatives to the first purpose, waste disposal, were
23 not adequately addressed in the EA document; however,
24 this deficiency was found to be cured on the evidence
25 adduced at the hearing and the Board accepted the EA

1 and granted approval to proceed subject to terms and
2 conditions.

3 Significantly, Mr. Chairman, the Board
4 did not require a new assessment or a new notice or
5 even a new hearing, although in our view it can be
6 argued that it made a de facto change or amendment in
7 the purpose, in the original stated purpose of the
8 undertaking.

9 THE CHAIRMAN: When did it make that
10 change, in rendering the decision, or at an earlier
11 stage in the proceeding?

12 MR. LINDGREN: I was not privy to the
13 proceedings. I would suggest at the very latest it did
14 it in the decision. Perhaps Mr. Dahme may be in a
15 position to tell us.

16 THE CHAIRMAN: Do you happen to know the
17 answer to that, Mr. Dahme?

18 MR. DAHME: It was in the decision.
19 There was a motion brought as to the relevance of the
20 evidence of Mr. Emond and Mr. Gibson insofar as it
21 dealt with the question of law and we were seeking to
22 have that evidence excluded.

23 The Board chose to accept that evidence,
24 but they did not make a ruling on the impact of that
25 evidence and the determination as to the amendment of

1- the purpose until the decision came out.

2 MR. LINDGREN: Mr. Chairman, we submit
3 that the SNC decision does support our position that
4 there may be certain circumstances where it may be
5 reasonable to amend rather than reject.

6 This will have to be determined on a
7 case-by-case basis, Mr. Chairman, and we suggest that
8 in deciding whether to amend, the Board should look at
9 various matters. And I have listed a few and there are
10 probably others.

11 We submit that the Board should look at,
12 first of all, the purpose of the Act, obviously. The
13 Board should look at the stage of the proceeding;
14 whether it's the beginning, the end, the middle. The
15 Board should look at whether new notice may be
16 required. The Board should have regard to the nature
17 of the undertaking and the scope of the Environmental
18 Assessment Document that has been submitted to that
19 point. The Board should also have regard to the amount
20 of costs thrown away that may -- or the amount of costs
21 that may result from a rejection instead of amendment.
22 And, finally, the Board should have regard to the
23 nature of the amendment: If it's minor, an amendment
24 may be appropriate; if it's major, if it's substantial,
25 if it results in a fundamental change in the

1 undertaking, then the Board may well have to reject the
2 environmental assessment outright because of
3 insurmountable notice or Environmental Assessment Act
4 considerations.

5 THE CHAIRMAN: How does the Board address
6 the issue of costs thrown away in this hearing?

7 MR. LINDGREN: I don't believe you can,
8 sir. In any event, the need to substantially change
9 the purpose is, I think, the worst case scenario, but
10 short of that worst case we submit, in principle, there
11 is no reason why the purpose cannot be amended, in
12 circumstances, provided that notice problems can be
13 resolved in some manner.

14 Now, to ensure notice can be a very real
15 problem, as we have seen in the Hydro case, and I don't
16 want to underestimate the magnitude of that problem,
17 but I would submit it's not an insurmountable problem.
18 We are confident that the Board can fashion an
19 appropriate notice mechanism or amend the notice
20 mechanism if it was to amend or --

21 THE CHAIRMAN: Without going back to
22 square one in this proceeding it could fashion a notice
23 mechanism; it could start a new hearing?

24 MR. LINDGREN: That is one option. The
25 other option would be to adjourn and provide notice, if

1 that was necessary. -- I mean, we will have to hear from
2 Mr. Freidin.

3 THE CHAIRMAN: No, but how do you correct
4 the situation where new parties come in as a result of
5 the new notice, dealing with perhaps an expanded
6 purpose, and they have not had the benefit of hearing
7 any of the evidence that has been previously adduced,
8 they have not had the benefit of hearing the other
9 parties' cross-examinations or parties in support, and
10 they have not had the benefit of hearing the
11 re-examination of the proponent on matters raised in
12 cross; they come into a hearing in the context of this
13 case after the proponent's case is in.

14 Now, how are they to be perceived to be
15 treated equally, fairly in accordance with procedural
16 fairness, natural justice, et cetera, when they are
17 injected into the process at a stage where the entirety
18 of the proponent's case is in?

19 MR. LINDGREN: That is a very real
20 problem, Mr. Chairman, it's a serious concern, and that
21 is why I said earlier, the Board has to have regard to
22 the stage of the proceeding.

23 THE CHAIRMAN: No, but go one step
24 further, assist the Board in telling us how we could
25 practically overcome that one proposition right there,

1 if we determined that to amend the purpose at this
2 stage it would require a new notice to draw in parties
3 who may be interested in matters which could only be
4 reasonably brought up in the context of the amended
5 purpose; at that stage of the proceeding, how can we
6 practically avoid a situation which would result in a
7 denial of procedural fairness?

8 MR. LINDGREN: Under the circumstances of
9 this case, Mr. Chairman, that type of problem may well
10 be unavoidable.

11 THE CHAIRMAN: And, therefore, I take it
12 going the one step further from that comment, that that
13 means going back to square one?

14 MR. LINDGREN: That may well be the case.

15 THE CHAIRMAN: Okay.

16 MR. LINDGREN: That may well be the case.

17 THE CHAIRMAN: Well, if you have another
18 opinion, Mr. Lindgren, put it forward. I mean, you
19 know, you have been present throughout or most of the
20 case, you know what has gone in and if you feel -- put
21 it this way: If you were the party that were being
22 asked to come in at the halfway point as a result of an
23 amended notice, I am not sure you wouldn't be raising
24 questions about having been prejudiced by not hearing
25 all of the evidence relative to the proponent's case

1 having gone in.

2 MR. LINDGREN: You can be sure that those
3 arguments would probably be raised. But, as I said at
4 the very outset, Mr. Chairman, I don't think it's
5 necessary for the Board to resolve that issue.

6 THE CHAIRMAN: Well, we have to resolve
7 it in the context of this case.

8 MR. LINDGREN: If a party properly brings
9 a motion requesting a de facto or actual amendment to
10 the purpose, and that has not occurred to this point.

11 THE CHAIRMAN: Well, we have a very good,
12 shall I say, suspicion of the type of amendment that
13 may be requested, should it formally ly be put forward.

14 Mr. Dahme, without putting words in your
15 mouth, I suggest that what you put forward earlier
16 might well approximate the type of amendment that you
17 might put forward formally should the Board hold that
18 it has jurisdiction.

19 MR. DAHME: (nodding affirmatively)

20 THE CHAIRMAN: Unless you want to deny
21 that at this point.

22 MR. DAHME: I think that is true, Mr.
23 Chairman.

24 THE CHAIRMAN: So maybe we don't have the
25 precise wording exactly agreed upon to the letter, but

1 we have to decide this motion, Mr. Lindgren, in the
2 context of that type of amendment and its ramifications
3 in terms of notice provisions, et cetera.

4 MR. LINDGREN: Well, I have no further
5 submissions, Mr. Chairman.

6 I just conclude that the second issue
7 should be answered in the affirmative as well. We
8 submit that there are circumstances where the purpose
9 can be amended.

10 THE CHAIRMAN: It may well be, but those
11 circumstances may also not be present in this case--

12 MR. LINDGREN: Perhaps.

13 THE CHAIRMAN: --given some of the other
14 factors.

15 Okay. Mr. Cosman?

16 MR. COSMAN: Thank you, Mr. Chairman.

17 THE CHAIRMAN: Are you ready?

18 MR. COSMAN: Yes. Mr. Chairman, so many
19 of my friends cited your new book I thought I better
20 have it with me, but I discovered an additional purpose
21 for it at a hearing such as this when one is short of a
22 dais, Mr. Chairman.

23 THE CHAIRMAN: I should probably have
24 them raise the price a bit if it has a multiple
25 purpose.

1 MR. COSMAN: Mr. Chairman, what is before
2 you is the determination of a pure legal issue, it's a
3 pure legal issue that's defined by the Notice of
4 Motion; and, that is, whether the Board can amend the
5 purpose of the undertaking.

6 My submissions are not made on the
7 philosophical basis or political basis, it's a question
8 of law that you have to decide, and it's on that basis
9 that I make my submissions to you; that is: Can this
10 Board amend the purpose of the undertaking or can the
11 Board in general amend the purpose of the undertaking
12 at the outset, let alone after 20 months' of evidence.

13 There is no motion before you with
14 respect to the rejection of the environmental
15 assessment if the purpose is inappropriately
16 formulated. I submit it is appropriately formulated
17 but, in any event, you don't have to decide that issue,
18 that issue is not before you for decision at this time.

19 I have three submissions and I will
20 illustrate what they are and then I will develop them.

21 The first submission is that all
22 submissions are directed to the conclusion that the
23 Board does not have the jurisdiction to amend the
24 purpose of the undertaking. The first submission is
25 that to ask the Board to amend the purpose of the

1. undertaking would be to ask the Board to change the
2 undertaking itself and, in that regard, I rely upon the
3 provisions of the Environmental Assessment Act as
4 interpreted by the Court of Appeal in the Ontario Hydro
5 case. That will be my first submission.

6 The second submission, I will be making
7 an additional legal argument based upon the
8 Environmental Assessment Act itself and, in particular,
9 Section 14(1)(iv). As stated in my factum, that is the
10 section that clearly gives the Minister the authority
11 to make a change to the undertaking; whereas there is
12 nothing in the Act that gives the authority to the
13 Board to do that.

14 And my third submission is one based on
15 basic administrative law principles, and my submission
16 is that it would be a denial of natural justice for the
17 Board to amend the purpose of the undertaking
18 especially at this point in the hearing.

19 I want to start with my third submission,
20 that of basic administrative law principles. As you
21 know very well, it is clear in law that a tribunal,
22 including this one, must decide what has been referred
23 to it and it's clear, I submit in law, that it would be
24 a denial of natural justice if in the course of the
25 hearing the matter referred takes on a different nature

1. such that parties at the hearing or those who are not
2 at it are faced with a decision on something different
3 from the matter that was referred.

4 And this goes to some of the questions,
5 Mr. Chairman, that you put to counsel in the course of
6 their submissions. If this timber management hearing
7 became a fisheries management hearing, and I submit it
8 cannot; or a parks management hearing, and I submit it
9 cannot; or on inquiry into everything that should be
10 done for our native peoples in the north or for the
11 northern environment as a whole, then I submit there
12 would be a denial of natural justice to those parties
13 who did not have notice of that and who have chosen not
14 to participate or who have participated in a certain
15 fashion in this proceeding.

16 I submit that that cannot be done and to
17 change the purpose of the undertaking would be to do
18 that. In addition to that basic principle there is the
19 practical consideration, and I think counsel indicated
20 that 10 years might be the time necessary to deal with
21 such a hearing, and I submit that that, given the
22 experience of dealing with one resource--

23 THE CHAIRMAN: Might be optimistic.

24 MR. COSMAN: --would be optimistic. This
25 Board, although it must consider the betterment of the

1 people of Ontario clearly as Mr. Dahme puts it, but
2 it's not an inquiry at large into the betterment of the
3 people of Ontario, that is the role of the legislature.
4 This Board, for legal and practical considerations as I
5 have developed, must consider that betterment in the
6 context of a specific undertaking having a specific
7 purpose that is referred to it for decision, and let me
8 develop that.

9 The undertaking here has been defined by
10 the proponent and the Court of Appeal has made it very
11 clear that the proponent has the clear right to do
12 that. And, Mr. Chairman, my argument is developed in
13 seven paragraphs in my statement of fact and law, which
14 I believe you have a copy, and I won't be referring
15 specifically. It's paragraphs 1 to 7.

16 So given that the proponent has the clear
17 right to define an undertaking, you then look to see
18 what the undertaking is that the proponent has defined,
19 and the decision or the undertaking here has to be
20 looked at in the context of the earlier ruling of the
21 Board on the issue constitutes the four activities of
22 access, harvest, renewal and maintenance together with
23 the planning for those activities. But those
24 activities cannot be considered in a vacuum; access
25 harvest, renewal and maintenance are activities for a

1. certain defined purpose and that purpose is as set out
2 in the Environmental Assessment Document.

3 It's my submission that the activities
4 and the planning for them are inextricably linked, you
5 can't look at one without the other. Furthermore, they
6 are the case that we have prepared to meet, they are
7 the undertaking that was referred and it is in that
8 context of the undertaking, having regard to the
9 activities, the planning for them and the purpose, that
10 we have prepared for and have acted accordingly over
11 the last 20 months of evidence.

12 To put it as the Chairman has indicated
13 to one of the parties, and Mr. Dahme or my friend Mr.
14 Lindgren may have accepted, it may mean going back to
15 square one. I take it further than that, it will mean
16 going back to square one. If an undertaking different
17 from that which was referred to this Board becomes an
18 issue for this Board, it's my submission that the Board
19 doesn't have the power to change it, but even if it
20 did, given the 20 months' of evidence that have taken
21 place, it would mean, as a matter of law, going back to
22 square one, so that we could reconstitute our case on a
23 different basis, so the proponent can reconstitute its
24 case on a different basis, and so the evidence that we
25 have prepared, the cross-examinations that we conduct

1 will all have to be restructured.

2 Now, that doesn't mean - and this is what
3 becomes troublesome - that doesn't mean that the
4 activities of access, harvest, renewal or maintenance
5 or the planning for them can be carried out without
6 regard for other aspects of the environment. Clearly
7 that is not so, and this is why the Board has heard 20
8 months' of evidence to date in considering those other
9 aspects of the environment.

10 The Board has the obligation to ensure
11 that the environment in its full sense, both natural
12 and socio-economic, is assessed properly and considered
13 and that appropriate terms and conditions be imposed if
14 an approval is to be granted. So that the denial of a
15 motion to amend the purpose of the undertaking does not
16 mean that in somehow the environment is not going to be
17 protected by its decision.

18 Contrary to my friend Mr. Dahme's
19 position, the purpose does not change with the evidence
20 as he has suggested in his submissions. The purpose
21 was stated clearly at the outset, it describes why the
22 undertaking and why the various activities are carried
23 on and planned for, and this has never changed, this
24 has been a constant. - And again we say, we would have
25 conducted a very different cross-examination of the

1 MNR's evidence if in fact the purpose of the
2 undertaking was something different from that which was
3 stated.

4 I then go to the additional legal
5 argument that I have not yet made; and, that is, the
6 arguments based upon the Act itself. And I would ask,
7 Mr. Chairman, that you and Members of the Board, that
8 you have regard to Section 14(1)(b)(iv) of the Act.
9 This is a technical legal argument having to do with
10 statutory construction.

11 THE CHAIRMAN: Could we wait to get a
12 copy of the Act. Does anyone have an extra copy?

13 MS. SEABORN: I will be glad to lend you
14 mine. (handed)

15 MR. COSMAN: Mr. Chairman, it's a very
16 narrow point and very specific point, but you will see
17 that Section 14 states -- if you are dealing with a
18 copy -- no, I guess you are not.

19 Section 14(1)(b), and it's where the
20 Minister has accepted an environmental assessment of an
21 undertaking:

22 "...the Minister may, with the approval
23 of the Lieutenant Governor in Council..."
24 et cetera:

25 "(b) give approval to proceed with the

1. undertaking subject to such terms and
2 conditions as the Minister considers
3 necessary to carry out the purpose of
4 this Act and a particular requiring or
5 specifying,"

6 And then I take you down to sub (iv):
7 "such changes in the undertaking as he
8 considers necessary,"

9 So there is a specific provision under
10 the statute given to the Minister of the Environment
11 whereby he can make or she can make such changes in the
12 undertaking as the Minister considers necessary.

13 That provision is not found in the
14 sections of the statute governing the powers of this
15 Board and I submit accordingly that, in the absence of
16 them, it provides an additional legal argument to that
17 which I have already submitted as to why this Board
18 should not change the purpose of the undertaking.

19 Finally then, Mr. Chairman, in conclusion
20 it's my submission that the Board has the power and the
21 obligation to protect the environment, natural and
22 socio-economic; that the power of the Board to impose
23 terms and conditions of approval are available to the
24 Board for that purpose, and that there has been nothing
25 suggested to date in this hearing that would justify a

1. change in the definition of the purpose of the
2 undertaking which could not be accommodated through
3 those terms and conditions.

4 Furthermore, as a matter of law it's my
5 submission that the Board does not have that
6 jurisdiction. I am much obliged.

7 THE CHAIRMAN: Thank you.

8 Ms. Seaborn, are you ready?

9 MS. SEABORN: Yes. Thank you, Mr.
10 Chairman.

11 THE CHAIRMAN: I think what we will do is
12 complete -- how long do you expect to be, before we say
13 we will complete yours?

14 MS. SEABORN: 15 minutes or so.

15 THE CHAIRMAN: All right. I think what
16 we will do is we will complete your argument and then
17 break for lunch, come back, and proceed with the
18 Ministry's response.

19 MS. SEABORN: Mr. Chairman, I would ask
20 that you have before you a copy of our factum and I
21 have extra copies if Mr. Martel's is in Thunder Bay as
22 well.

23 I also have a brief of authorities.

24 (handed)

25 THE CHAIRMAN: Thank you.

1 the undertaking has been approved to the
2 satisfaction of the decision-maker will
3 remain an important, if not the most
4 important issue to be considered in any
5 application under the Environmental
6 Assessment Act and must be evaluated in
7 the context of the wide definition of
8 environment provided in the Act as well
9 as its stated purpose."

10 And it's my submission, Mr. Chairman,
11 that in the context of this hearing the Board must be
12 satisfied that there is a need for the undertaking.
13 And if you accept the proposition that need is
14 synonymous with purpose, then the Board must be
15 convinced that there is a genuine need for a continuous
16 and predictable supply of wood for Ontario's forest
17 products industry.

18 Now, that is really what is going to be
19 one of the determining factors that the Board is going
20 to have to look at at the end of this case, and it's
21 our submission that at this stage in the hearing for
22 the Board to practically amend the purpose of the
23 undertaking would mean that the Board would be
24 evaluating the proponent's application in terms of need
25 in a very different context and the proponent would be

1 statement of purpose.

2 THE CHAIRMAN: Subject of course to
3 relevancy.

4 MS. SEABORN: That's right. You will see
5 in the first line of that, of Item 22 of our factum we
6 say subject to relevance, of course.

7 THE CHAIRMAN: Right.

8 MS. SEABORN: Now, Mr. Chairman, I would
9 just like to quickly go through the reasons for our
10 position.

11 You will see on page 2 of our factum I
12 put forward the proposition that the phrases 'purpose
13 of the undertaking' and 'rationale for the undertaking'
14 and, as used in the Act, point to 'need'. There is an
15 overlapping in the meaning of the words 'purpose',
16 'rationale' and 'need'. And, Mr. Chairman, you of
17 course are well versed in this topic and in this
18 regard. I have included in our brief of authorities
19 your dissenting opinion in relation to the Highway 403
20 decision.

21 If you could turn to Tab 2 of the book of
22 authorities and page 230 of the decision - they are
23 just excerpts of the decision that I have included -
24 and the second full paragraph on page 230 states that:

25 "Whether or not the requisite need for

1 MS. SEABORN: Mr. Chairman, the Ministry
2 of the Environment supports the submissions of counsel
3 for the OFIA in relation to this matter and, for this
4 reason, I think my submissions can be somewhat speeded
5 up from my original presentation.

6 In short, it is the Ministry of the
7 Environment's position that the Board does not have
8 unfettered discretion to amend the statement of the
9 purpose of the undertaking and, in our view, in the
10 context of the motion that is in front of you today
11 that is really, as Mr. Lindgren said, the more
12 problematic and in fact the real crux of the motion
13 that is before you today: Can this Board amend the
14 purpose of an undertaking?

15 The reasons for our position are set out
16 in our factum and if you just could turn to page 6 of
17 the factum, which is the last page, you will see that
18 we have suggested that the Board order two things:
19 First of all, we submit that the Board does not have
20 unfettered discretion to amend the statement of purpose
21 of the undertaking; and, second, that subject to
22 relevance, no party be prevented from leading evidence
23 or proposing terms and conditions with respect to
24 alternative planning processes or methods of carrying
25 out the undertaking by reason of the proponent's

1 in an awkward position, perhaps with respect to
2 approving the requisite need, if at this stage in the
3 proceedings the definition of the purpose were widened
4 in any event.

5 Now, we have said - and I think Mr.
6 Lindgren stated this as well - that the Board can
7 reject the environmental assessment in two instances;
8 first, where the purpose cannot be justified and I
9 would look at that in the context of there just isn't
10 any need for the undertaking; secondly, where an
11 alternative to the undertaking provides a significantly
12 better means to satisfy or substantially satisfy the
13 purpose of the undertaking.

14 Now, it's our submission that the Board's
15 authority does not extend to imposing on the proponent
16 a purpose or objective which the proponent has no
17 intention of pursuing and, in very simple terms, the
18 proponent is entitled to a decision with respect to the
19 application it has filed.

20 And while the environmental assessment
21 process is clearly fluid, the question at the end of
22 the day again remains whether or not the proponent has
23 justified that there is a need for the undertaking.

24 And I would suggest that, in those
25 circumstances, the Board's remedy or the Board's way if

1. dealing with it wouldn't be to impose a new and
2 redefined purpose on the proponent, but would be to
3 reject the application on the ground that there is not
4 the justification for that particular application.

5 Now, the Federation relies on the
6 decisions of the Joint Board in the Ontario Hydro
7 decision of the early 80s to support their view that
8 the Board can amend the purpose of the undertaking.
9 Now, our submission with respect to those cases and
10 with respect to the Simcoe case that Mr. Lindgren
11 relied is found at page 4 of our factum, paragraph 9.

12 And you will see in paragraph 9 we say
13 that:

14 "On past occasions the Board has
15 permitted definition of purpose to evolve
16 over the course of the environmental
17 assessment, it has submitted that the
18 Board's statements on fluidity of the
19 hearing process and the parties' ability
20 to review the proponent's statement of
21 purpose were made in the context of the
22 Board's authority to rule on the scope
23 of the analysis set out in the
24 environmental assessment."

25 The authorities relied upon by the

1 Federation stands for the proposition that the
2 proponent cannot define its statement of purpose so
3 naturally really that the identification of
4 alternatives would be unduly restrictive.

5 This is a different proposition than the
6 one that Mr. Dahme has put forward, and I would suggest
7 that these cases do not stand for the proposition that
8 the Board does have the jurisdiction to amend, per se,
9 the definition.

10 There has never been any suggestion that
11 the Federation or any other party cannot put forward in
12 this hearing alternative methods of carrying out the
13 undertaking or, in fact, alternatives to the
14 undertaking. Clearly the Board has wide discretion
15 with respect to the terms and conditions and, frankly,
16 I don't think there is anything that Mr. Dahme or Mr.
17 Lindgren has said today that would persuade me that the
18 Federation or any other party is restricted in any way
19 in framing appropriate terms and conditions that would
20 meet their client's need.

21 And any intervenor to this hearing can,
22 at the end of the day, urge a wide range of terms and
23 conditions upon the Board for acceptance and, again,
24 the real determining factor is with respect to
25 relevance.

1 And following along from that, is that I
2 don't see how a change in the definition of the purpose
3 of the undertaking at this stage would in any way
4 change the Federation's participation in the hearing.
5 And this really goes, Mr. Chairman, to some of your
6 comments earlier this morning that: What is the
7 practical effect of what will happen?

8 I would submit that whether or not the
9 purpose is redefined will not affect the way in which
10 the Federation has to put forward its evidence because
11 if the Federation is going to propose certain terms and
12 conditions they are going to have to either call
13 evidence to support those terms and conditions or they
14 are going to have to conduct cross-examinations and
15 rely on their past cross-examinations in order to
16 support those terms and conditions.

17 And I think that it is a red herring in
18 this argument for the Federation to say that if the
19 purpose of the undertaking were redefined by the Board
20 they would take a different position with respect to
21 the way in which they would call their case.

22 I would suggest that in order to urge
23 upon the Board certain terms and conditions they would
24 have to make those arguments in any event and, for that
25 reason, as a practical matter, it's our position that

1. it is not necessary for the Board to change the purpose
2 of the undertaking.

3 Mr. Dahme said that one of the reasons
4 why his client wishes to redefine the purpose is to put
5 another complexion on the purpose of the undertaking
6 and, in that regard, I would go to Mr. Cosman's
7 submissions that today what we are looking at is a
8 strictly legal argument in the sense of whether or not
9 the Board has that jurisdiction.

10 And I would suggest that it's not an
11 appropriate reason for the Board to change a
12 proponent's purpose because an intervenor wants to put
13 a different complexion on the case. I think that is
14 something that an intervenor can do, again, through
15 terms and conditions and by calling their own evidence,
16 and just by calling their own evidence, obviously, any
17 intervenor is going to be putting a certain complexion
18 on the case.

19 Mr. Lindgren suggested that the Board
20 ought to do up front what it can do through terms and
21 conditions. And, Mr. Chairman, you asked Mr. Lindgren:
22 What is the necessity then to change the purpose? And
23 Mr. Lindgren I believe responded that it may affect how
24 an intervenor will present its case.

25 For the reasons I said before, I think

1 that if a party is going to argue that you should do up
2 front what you can do through terms and conditions, I
3 don't see where the distinction would come in in terms
4 of how one would present their evidence. I think that
5 you would present your evidence in exactly the same
6 way.

7 Again, with respect to the hypothetical
8 that Mr. Lindgren put forward, he suggested that a
9 hypothetical purpose may be to harvest every stick of
10 wood in the province and, Mr. Chairman, you suggested
11 that that may be rejected on the basis of environmental
12 reasons. I would also add to that that, again, if that
13 were a purpose of an undertaking, the proponent would
14 also have to prove that there was a need to harvest
15 every stick of wood in the province and under that
16 hypothetical, on the basis of failing to provide need,
17 the Board would be in a position to reject the
18 undertaking as well as on the environmental grounds
19 under that scenario.

20 Again, Mr. Chairman, as a practical
21 matter, at page 5 of our factum we again repeat that
22 the specific ruling that is sought by the Federation is
23 not necessary for them to advance their position in the
24 hearing and, in our view, the proponent's statement of
25 purpose imposes no restrictions on the alternatives to

1 the undertaking or alternative methods of carrying out
2 the undertaking or different planning processes which
3 the Federation may wish to put forward.

4 Again, it doesn't place any restriction
5 on the Federation's right to propose that the Board's
6 approval of granting be subject to terms and conditions
7 with respect to alternative methods of carrying out the
8 undertaking or alternative planning processes.

9 For those reasons, Mr. Chairman, we have
10 requested that the Board order two things and, as I
11 said at the outset, those items are found on page 6 of
12 our factum.

13 Subject to any questions the Board may
14 have, those are my submissions.

15 MRS. KOVEN: I have a question, Ms.
16 Seaborn. Could you refresh my memory about whether
17 there was anything in the government review with
18 respect to the definition of the purpose by the
19 proponent?

20 In other words, I am curious to know,
21 assuming that the proponent has some sacrosanct
22 protection of being able to define the purpose of the
23 undertaking, is he treated similarly before the hearing
24 is-underway by the EA Branch?

25 MS. SEABORN: Mrs. Koven, I think what I

1 would like do is just have a look at the review and see
2 if I can find the appropriate section during lunch and
3 perhaps answer your question after the break, if that's
4 all right.

5 THE CHAIRMAN: Very well, ladies and
6 gentlemen, I think we will break for an hour. So we
7 will come back at a quarter to two.

8 Thank you.

9 ---Luncheon recess taken at 12:40 p.m.

10 ---On resuming at 1:50 a.m.

11 THE CHAIRMAN: Thank you, everyone.
12 Please be seated.

13 Were you going to complete that answer
14 you were going to provide for Mrs. Koven prior to the
15 break?

16 MS. SEABORN: Yes, thank you, Mr.
17 Chairman.

18 The government review, which is Exhibit 5
19 to the proceedings, at page 73 has some conclusions
20 with respect to the EA components and this is
21 essentially the MOE's summary of whether or not the
22 proponent has met the requirements of the Act.

23 The only thing they say, Mrs. Koven, in
24 the context of purpose is that the EA contains the
25 required description of purpose, period. And then on

1 page 74 it continues on talking about the definition of
2 the environment and, in the context of the purpose,
3 talks about an evaluation of alternatives to the
4 undertaking and alternative methods of carrying out the
5 undertaking. And, in my submission, the government
6 review concludes that the proponent has adequately
7 described the alternatives to the undertaking and
8 alternative methods of carrying out the undertaking in
9 the context of its stated purpose.

10 THE CHAIRMAN: Ms. Blastorah?

11 MS. BLASTORAH: Mr. Chairman, I hope not
12 to be too long. I don't intend to go in any length at
13 all through the issues raised or the positions raised
14 in our factum. I think it is fairly clearly set out in
15 the factum which is very short, so I don't intend to
16 review that in detail, rather I will spend most of my
17 time responding to comments made by my friends this
18 morning.

19 I would simply point out, and I think it
20 is obvious from statements in our factum, that it is
21 the Ministry's position, first of all, that the
22 description of purpose is a statement of fact and I
23 think that is consistent with the statements that have
24 been made in the various cases cited this morning, and
25 I will be coming back to that later in dealing

1. particularly with the SNC case. I would just remind
2 the Board of that position at this time.

3 I would like to begin by saying that I
4 agree with the submissions of my friend Ms. Seaborn on
5 behalf of the Ministry of the Environment, especially
6 her submissions with regard to paragraph 9 of the
7 Ministry of the Environment's factum dealing with the
8 authorities cited by the Federation in their factum and
9 the characterization to be put on those authorities.
10 And, again, I will be addressing that in a little more
11 detail later.

12 I will not be making any extensive
13 submissions with regard to the issue of notice or the
14 issue of natural justice, I would only reinforce my
15 friend Mr. Cosman's submissions with regard to that
16 issue, particularly his comments with regard to
17 prejudice which would be incurred not only by parties
18 who are not in attendance at the hearing because of
19 what they may have taken to be the scope of that
20 hearing given the stated purpose as set out in the
21 Environmental Assessment Document, but also those
22 parties who have been actively involved in the hearing
23 to date, and Mr. Cosman addressed that issue from the
24 standpoint of his client at least.

25 I would like to begin by referring to

1 some of the comments made by Mr. Dahme in his
2 submissions on behalf of the Federation this morning.
3 He indicated at the outset of his submissions that he
4 is not seeking to expand the scope of the hearing
5 before the Board into the entire realm of resource
6 management, and I would like to refer to a transcript
7 from very early in the hearing in relation to that
8 which is Volume 7, the transcript for May 18th, 1988,
9 at page 1192 and 3, and these are comments made by Mr.
10 Williams on behalf of the Federation which are
11 essentially to the same effect as those made by Mr.
12 Dahme.

13 So I would just like to indicate that
14 that's the position that's been consistently put
15 forward not only to the Board, but to the proponent
16 throughout this hearing. And Mr. Williams indicated at
17 that time, which would have been the 7th day of the
18 hearing:

19 "I do agree with earlier comments that it
20 would certainly appear, in any event,
21 to be inappropriate to address some of
22 the related issues and assess them on a
23 critical basis the same way in which the
24 timber management aspect, which is the
25 undertaking, is to be criticized. For

1 the parties to go into an in-depth
2 analysis and criticism of, say, moose
3 management or fish management as has
4 been stated by others, would seem to be
5 totally inappropriate."

6 And those comments I think are consistent
7 with the comments that I indicated Mr. Dahme had made
8 this morning.

9 Now, what I do find somewhat inconsistent
10 with both of those comments is the proposed statement
11 of purpose that was indicated by the Federation that
12 they will be putting forward in their terms and
13 conditions and would be seeking an amendment to the
14 purpose from the Board to be consistent with that
15 proposed term and condition.

16 And my notes of that proposal are as
17 follows: They would suggest that the purpose be
18 restated as to provide a predictable supply of resource
19 benefits from the forest estate through management of
20 the forest structure; and, secondly, to strive for an
21 optimum mix of resource benefits.

22 And I would submit that that position
23 with regard to how the purpose should be described is
24 inconsistent with the comments made by Mr. Williams on
25 the 7th day of the hearing and by Mr. Dahme this

1 morning in that, I would submit, the purpose stated in
2 that way would essentially involve or require a review
3 of not only wildlife management but fisheries
4 management, tourism management and some of the other
5 resource management activities referred to by Mr.
6 Cosman during his submissions and would, as you
7 yourself pointed out, Mr. Chairman, broaden the scope
8 of this hearing substantially and realistically out of
9 all proportion.

10 Mr. Chairman, you asked this morning Mr.
11 Dahme whether, in his opinion, that the proponent's
12 case would have been any different were the purpose of
13 the undertaking stated as his client is suggesting.
14 And to quote Dr. Euler, I think the answer to that is a
15 big yes. I would indicate to the Board that it is the
16 position of the Ministry of Natural Resources that a
17 statement of purpose such as that suggested by the
18 Ontario Federation of Anglers & Hunters would, as I
19 have just submitted and I think as you indicated
20 yourself this morning, Mr. Chairman, involve this panel
21 in a review of far more than the activities of timber
22 management; it would involve and require a review of
23 all of those other types of resource management that
24 the Ministry of Natural Resources carries out and,
25 obviously, would have required the proponent to call

1. substantially different evidence and substantially
2 greater evidence with regard to alternatives to
3 wildlife management, fisheries management, tourism
4 management and numerous other areas as well as
5 alternative methods of carrying out those activities.

6 None of that evidence has been put before
7 the Board in terms of addressing the undertaking which
8 is before the Board, and I would suggest that the
9 evidence of the proponent would have been substantially
10 different as would, I would suggest, the
11 cross-examination of other parties.

12 And I would suggest that not only would
13 the evidence have been different, obviously the
14 undertaking itself would have had to have been
15 characterized very differently were it intended to meet
16 that restated purpose as suggested by the Ontario
17 Federation of Anglers & Hunters.

18 Timber management in and of itself would
19 obviously not meet the purpose of the total management
20 of all of those various resources and, as the second
21 leg of that proposed amendment suggests, would not meet
22 the purpose of striving for an optimum mix of resource
23 benefits in and of itself.

24 Mr. Dahme has admitted this morning that
25 the evidence they seek to call to support their

1 position and address their concerns is not and has not
2 been ruled irrelevant to date, that such evidence would
3 be relevant and, therefore, could be adduced by the
4 Federation of Anglers & Hunters and in fact he
5 indicated that the Federation intends to put forward
6 terms and conditions in, I take it, essentially the
7 same words as they would be proposing the purpose
8 should be restated to read.

9 And as you indicated yourself, Mr.
10 Chairman, no one else has suggested that evidence on
11 the impacts, evidence with regard to the impacts of
12 timber management on other values should be ruled
13 irrelevant. It has not been ruled irrelevant to date
14 and no one has suggested or argued that it should be.

15 Rather, Mr. Dahme indicated that it was
16 not a question of the relevance of that evidence that
17 he was concerned about, but rather the complexion to be
18 put on that evidence if and when the Federation deems
19 it appropriate to call such evidence.

20 And as Ms. Seaborn indicated - and I
21 would support her submission in this regard - each time
22 one of the other parties to this hearing calls evidence
23 they put their own complexion on the case which is
24 before the Board, that is the purpose of their calling
25 evidence surely, and the intention of calling that

1 evidence is to put a complexion on the case which
2 furthers the objectives that party is trying to
3 achieve.

4 So I would submit that if Mr. Dahme's
5 concern is to put the Federation's complexion on the
6 evidence before the Board, that is surely the purpose
7 of their own case and why they are here to call
8 evidence.

9 And, Mr. Chairman, further you indicated
10 that concerns with regard to other values can be
11 addressed through terms and conditions. And, as I have
12 already indicated, Mr. Dahme in stating their suggested
13 or what they would be suggesting would be the amended
14 purpose indicated what they propose and that they will
15 probably be bringing that forward as a suggested term
16 and condition.

17 You indicated that their concerns would
18 be addressed through terms and conditions such as the
19 ones they propose. Whether or not the Board deems
20 those terms and conditions acceptable is another issue;
21 but, in any event, Mr. Chairman, you indicated that
22 given that terms and conditions could address those
23 issues you didn't really see any reason that it was
24 - necessary to redefine the purpose to achieve that end
25 and I would agree with you on that comment, and I would

1 strongly agree with that comment.

2 Mr. Dahme admitted in fact in his
3 submissions this morning that that was the case, that
4 terms and conditions could address those issues, could
5 address other values and could address the protection
6 of other values during the conduct of timber
7 management, and that that would be an appropriate
8 mechanism to protect the values. Again, he indicated
9 his concerns with the emphasis which will be given to
10 their evidence with regard to what protection was
11 necessary and what was required to protect those other
12 values and, as I have indicated, he did admit that
13 evidence would be relevant.

14 Well, I would submit that it is up to
15 them, up to the Federation and any other party for that
16 matter to call their own evidence about what they feel
17 is necessary to protect values of concern to them or
18 achieve objectives which are of concern to that party.
19 And if the Board deems it appropriate and, as you
20 indicated, Mr. Chairman, if the Board is convinced by
21 that evidence that that protection is required in order
22 to protect those values, the Board can and should
23 impose terms and conditions and can fashion terms and
24 conditions either based on those suggested by the
25 proponent or based on whatever the Board's opinion is

1 as to what is required.

2 So that I would submit the emphasis to be
3 given to the evidence put forward by the Federation or
4 by other parties is really a decision that should be
5 left to the Board and is in fact the Board's decision.
6 It's really a question of the weight they choose to
7 give to the evidence put before them, it is not
8 something that requires a change to the purpose of the
9 undertaking.

10 In relation to that suggestion by Mr.
11 Dahme, that in order for them to somehow put the right
12 complexion on the case before the Board it is necessary
13 to change the purpose, I would submit that that could
14 potentially put the Board in a position that every time
15 a new party is about to call their case they suggest in
16 order to put the right complexion on the evidence they
17 are going to call the purpose has to be changed again.

18 It is one thing to say that the
19 environmental assessment is an evolving process, but I
20 think that that would move into the ridiculous, to say
21 that the purpose would be repeatedly changed to suit
22 the objective of each party that intends to call
23 evidence before the Board. We can get into repeated
24 and ridiculous changes.

25 THE CHAIRMAN: You indicated that you

1 were not going to go into natural justice concerns, but
2 were that to happen, that a party prior to putting in
3 their case decided that in order to put the appropriate
4 complexion on the evidence they were proposing to call
5 the purpose should be amended accordingly to
6 accommodate that proposed evidence, what is your view
7 as to the implications aceding to that in terms of the
8 adequacy of the original notice of this hearing?

9 MS. BLASTORAH: It is a little difficult
10 to answer that question in the abstract, Mr. Chairman,
11 because obviously I don't have any suggestion from any
12 parties other than the Federation as to what their
13 suggested change of purpose would be.

14 THE CHAIRMAN: But if that were the
15 suggested change.

16 MS. BLASTORAH: If that were the change,
17 I have already indicated I think that would
18 substantially change the matter before the Board, so
19 not only would parties before the Board be
20 substantially prejudiced, as Mr. Cosman argued, there
21 may well be many parties who are not before this Board
22 and they did not feel they had adequate concerns to
23 appear here based on the issue that was before the
24 Board.

25 Not to acknowledge in any way that the

1 Board does have the power to change the purpose, I
2 think that even accepting for the sake of argument that
3 the Board could do that, I think merely indicating that
4 the Board could somehow address the notice issue or
5 could limit changes to those which really don't have a
6 major notice problem doesn't really address the problem
7 of whether it is appropriate for them to do so. The
8 mere fact that the Board may be able to get around a
9 problem with regard to notice does not automatically
10 mean that the Board should be doing that.

11 THE CHAIRMAN: No, obviously it's --

12 MS. BLASTORAH: That's another issue.

13 THE CHAIRMAN: That's a question that
14 goes to the question of jurisdiction.

15 MS. BLASTORAH: Apart from the question
16 of jurisdiction --

17 THE CHAIRMAN: I think the Board is
18 looking at the practical implications for a hearing in
19 its 20th month after the proponent's case is already
20 in, we would like to be given the jurisdiction
21 question: If it were possible to decide it as
22 requested by two of the parties before us today, what
23 does that imply in terms of this hearing at this point
24 in time in view of what ramifications such a finding
25 would have vis-a-vis notice?

1 MS. BLASTORAH: Well, Mr. Chairman, I
2 think you have already made a number of comments and I
3 have already made some comments and referred to
4 submissions made by Mr. Cosman and others that I think
5 it would be a big problem in terms of this hearing. I
6 think there will be substantial problems with notice
7 and prejudice to parties, both before and not before
8 the Board.

9 Another issue that was raised by Mr.
10 Dahme this morning in his submissions, as I understood
11 him, was the suggestion that his client is somehow
12 hampered by the statement of purpose as it now exists
13 in their ability to call evidence with regard to the
14 appropriate range of alternatives, that that range of
15 alternatives is restricted somehow and I disagree with
16 that submission.

17 And I may have misunderstood Mr. Dahme,
18 but if I understood him correctly, I would certainly
19 disagree because, first of all, it is the Ministry of
20 Natural Resources' position that the definition of
21 purpose -- or description of purpose rather as stated
22 does not unduly restrict the range of alternatives to
23 be considered.

24 And you have just heard Ms. Seaborn in
25 reference to the government review indicate that that

1 was also the view of the Ministry of Environment during
2 that government review, they felt the alternatives to
3 and alternative methods considered were adequate to
4 meet the requirements of the Act. And I don't think
5 there has been any suggestion from anyone here this
6 morning that the alternatives to put forward by the
7 proponent are unacceptable or that others have not been
8 considered. Certainly we may hear evidence of that in
9 the future.

10 THE CHAIRMAN: I think there was some
11 indication that some parties may wish to put forward
12 just that proposition.

13 MS. BLASTORAH: My point is exactly that,
14 they have every opportunity to put forward that
15 argument. If they feel there are other appropriate or
16 reasonable alternatives to the undertaking which have
17 not been considered by the proponent, they certainly
18 have the opportunity in their own case to bring forward
19 evidence in that regard and are in no way restricted in
20 doing that by the statement of the purpose which is
21 contained in the Environmental Assessment Document.

22 I would like to turn briefly to some of
23 the authorities referred to by my friend Mr. Dahme. I
24 indicated I would be coming back to this. First of
25 all, I would like to turn to the SNC/Petro-Sun case,

1 the energy from waste case which was cited by Mr. Dahme
2 this morning and, in doing that, I would like to refer
3 in fact to a section from your recent publication, Mr.
4 Chairman - for the record I suppose I should read in
5 the title, Environmental Approvals in Canada, Practice
6 and Procedure by Michael I. Jeffery - and I would refer
7 specifically to paragraph 5.51 which in fact is a
8 paragraph dealing with the SNC case. And I am only
9 going --

10 THE CHAIRMAN: 5.51?

11 MS. BLASTORAH: 5.51, yes. I am only
12 going to be referring to two sentences from that
13 paragraph, so perhaps -- I'm sorry, page 5.23, item
14 5.51.

15 THE CHAIRMAN: This one goes up to 5.18.

16 MS. BLASTORAH: I have a copy of the book
17 here, Mr. Chairman, which I don't need, so...

18 THE CHAIRMAN: I apologize for not having
19 memorized the paragraph.

20 MS. BLASTORAH: I have in fact
21 photocopied the page that I am going to be referring
22 to.

23 THE CHAIRMAN: Okay.

24 MS. BLASTORAH: I am just going to refer
25 briefly to the last two sentences in that paragraph

1 5.51 which reads as follows, and this is, as I have
2 indicated, in reference to the SNC case:

3 "The Board stressed overriding importance
4 of an accurate description of the
5 undertaking in order not to mislead the
6 public and in order to lead to the
7 identification of alternatives to the
8 undertaking and evaluation of those
9 alternatives. The Board found that in
10 this case..." being the SNC case "...the
11 undertaking has been improperly defined,
12 the alternatives to the undertaking have
13 been implicitly identified."

14 And I would point out to the Board, I
15 think Mr. Dahme may have referred to this, but in any
16 event, I would confirm that the environmental
17 assessment in that case was accepted and approval was
18 granted.

19 Now, I would like to review briefly some
20 of the passages referred to by my friend Mr. Dahme, and
21 this is going back to the submissions made by Ms.
22 Seaborn in relation to her paragraph No. 9.

23 The Board indicated at page 29 of the
24 decision in the SNC case - and I believe this passage
25 was read in by Mr. Dahme this morning or at least

1 referred to - it is the last paragraph on page 29 of
2 the decision, Mr. Chairman. The Board states there
3 that:

4 "The purpose, relating to the functions
5 of the undertaking, should have been
6 described to be two-fold, to dispose of
7 waste and to produce energy. "

8 In referring to that case this morning, I
9 believe Mr. Dahme indicated that in fact the Board did
10 in that case change the purpose of the undertaking and
11 I think, Mr. Chairman, you questioned him later as to
12 whether that decision was made earlier or made in the
13 decision, and he indicated that the decision or change
14 was made in the decision.

15 Well, on review of the case I did not
16 find any reference explicitly to any change in the
17 statement of the purpose by the Board. In fact, the
18 only statement I can find which might be taken to refer
19 to a change to the purpose is the one I just read from
20 the bottom of page 29, and I don't think in any way
21 that statement can be taken to be a change to the
22 purpose of the undertaking; it is simply a comment by
23 the Board that the purpose could and should have been
24 more accurately described in order to reflect the
25 factual situation, that the real purpose for which the

1 facility was being constructed was both energy
2 production and waste disposal, and that is simply an
3 indication by the Board that it did not feel the
4 factual description set out in the environmental
5 assessment really was factual in that it had not
6 accurately reflected the true facts.

7 THE CHAIRMAN: It bears a striking
8 resemblance to the Board's recent ruling in that
9 context.

10 MS. BLASTORAH: In fact, Mr. Chairman, I
11 would turn back to the comment you made at paragraph
12 5.51 where you indicate that the Board stressed the
13 importance of an accurate description of the
14 undertaking so as not to mislead the public and in
15 order to lead to the identification of the alternatives
16 to.

17 And I would suggest that the reason why
18 the issue of purpose came up at all in the SNC case was
19 because of an argument as to whether the appropriate
20 alternatives to the undertaking had been canvassed and,
21 in fact, Mr. Dahme received two submissions by some of
22 the parties, notably the environmental coalition which
23 was appearing in that hearing, as well as the Ministry
24 of the Environment and indicated that those parties had
25 some concerns with regard to the alternatives that had

1 been put forward because an alternative to the waste
2 disposal function had not been adequately canvassed in
3 the opinion of some of those parties.

4 And I would like to turn to some
5 submissions that are referenced in the SNC case because
6 I differ somewhat in those interpretations from what
7 Mr. Dahme characterized them as this morning.

8 I would refer you specifically to, first
9 of all, page 21 and 22 of the judgment and I believe
10 this is one of the submissions that was referred to by
11 Mr. Dahme. He referred to evidence from Professor
12 Emond who was appearing on behalf of the environmental
13 coalition.

14 I will refer you to the sentence that
15 begins at the bottom of page 21 and which reads:

16 "In addition, Professor Emond held the
17 view that the proponent should not be
18 free to define the purpose in any way it
19 wishes. The definition of purpose should
20 be determined by an examination of
21 objective facts."

22 And I would submit, Mr. Chairman, that's
23 consistent with the comments I just made with regard to
24 this case. The Board in this case did not review the
25 substance of the purpose, it came to the conclusion

1 that the purpose as described did not accurately
2 reflect the facts of the case and, in that event, they
3 indicated that the description should have been
4 different.

5 I would submit that what Professor
6 Emond's point there was what the Board indicated at the
7 bottom of page 29, was basically that you don't change
8 the purpose to suit some other consideration, you
9 change the description of purpose to suit the facts
10 with regard to what the purpose is.

11 And, again, this was argued based on that
12 statement I gather from Mr. Emond's counsel for the
13 coalition and this is at page 22 of the judgment.
14 Following immediately after the sentence I have just
15 read, the following statement is made in the decision:

16 "Ms. S. Couban, counsel for the
17 Coalition, in her final summation,
18 submitted that the proponent should be
19 required to describe the purpose of the
20 undertaking in keeping with the facts and
21 not in a way that avoids the intent of
22 the Act."

23 Again, I would stress the submission is
24 that the description should be in keeping with the
25 facts and, in that case, the facts were based on the

1 evidence called by the proponent. And I will be
2 referring to some passage in that regard in a moment,
3 that the purpose of the undertaking, the functional
4 purpose of the undertaking was energy production and
5 waste disposal.

6 Now, again, I may have misunderstood Mr.
7 Dahme, but I took him to say in his submission that
8 more than that, the parties making submissions before
9 the Board in that case encouraged the Board to change
10 the purpose of the undertaking, and I would simply
11 refer - not having been there I only have the decision
12 before me - but I would submit the summary of the
13 evidence for this decision is what the Board relied on
14 in making their decision.

15 I would refer to page 23 of the case
16 where the Board again referred to Ms. Couban, counsel
17 for the Coalition, as follows, and this is the first
18 full paragraph on page 23 of the case:

19 "Since Ms. Couban claimed that the Board
20 could not change the purpose of the
21 undertaking as defined by the proponent,
22 she argued that the Board must find that
23 the definition of purpose, the
24 alternatives evaluated and, therefore,
25 the environmental assessment are

1 unacceptable."

2 I would submit that's a clear statement
3 to me that the submission by the coalition was that the
4 Board did not have the authority to change the purpose
5 since it did not -- since the coalition felt that the
6 appropriate alternatives had not been evaluated, the
7 option of the Board was to reject the environmental
8 assessment because, as the coalition argued, the
9 statement of purpose unduly restricted the
10 consideration or evaluation of alternatives.

11 THE CHAIRMAN: But neither position was
12 accepted by the Board, they didn't find the
13 environmental assessment unacceptable--

14 MS. BLASTORAH: 'Mr. Chairman --

15 THE CHAIRMAN: --and they approved the
16 application.

17 MS. BLASTORAH: Before going on to the
18 submissions of MOE, I will refer to some statement by
19 the Board as to why that approval was given.

20 At page 30 of the decision, the Board
21 indicated in the last full paragraph on that page as
22 follows:

23 "In this instance the Board finds that
24 the proponent identified appropriate
25 alternatives to the energy production

1 function of the undertaking but not to
2 the waste disposal function of the
3 undertaking."

4 And going over to page 31, the paragraph
5 just below the two indented quotes there read as
6 follows:

7 "Information regarding alternatives to
8 the EFW waste management system was
9 compiled by the Region in its draft
10 Waste Management Master Plan. Although
11 the Plan is not before the Board, a
12 substantial amount of evidence relative
13 to the Plan was put forward in these
14 proceedings. Other waste management
15 options were examined in detail through
16 the evidence of the proponent and other
17 parties in response to the concerns
18 raised by the MOE during the Review and
19 by MOE, the Coalition and the public at
20 the hearing."

21 And it was on that basis that the Board
22 goes on in the next paragraph and indicates that:

23 "In order to find the environmental
24 assessment acceptable the Board must be
25 satisfied that it fulfills the purpose of

1 the EAA and provides sufficient

2 information upon which to make a decision

3 on the merits of the undertaking."

4 And, Mr. Chairman, the Board then goes

5 on - I won't read the comment going on the next

6 paragraph - and then over to the next page it indicates

7 that based on all the evidence put before the Board,

8 not only by the proponent but other parties, the Board

9 in the SNC case found that all the alternatives to both

10 functions had been adequately canvassed, and it was on

11 that basis that they accepted the environmental

12 assessment and approved the undertaking.

13 Notwithstanding submission by the parties that the

14 definition of purpose had unduly restricted the purpose

15 and alternatives, the Board felt the alternatives had

16 been adequately canvassed.

17 Going back to submissions by the Ministry

18 of the Environment which were again referred to by Mr.

19 Dahme this morning, he indicated that the Minister of

20 the Environment had some problems with the statement of

21 purpose and the undertaking put before the Board or

22 review of the alternatives to the undertaking put

23 before the Board, and I would just refer you to page 25

24 of the decision, the middle paragraph on that page, and

25 this is referring to evidence put forward by the two

1 witnesses appearing on behalf of the Ministry of the
2 Environment, Ms. Farnsworth and Mr. Ward who were
3 referred to this morning by Mr. Dahme and that
4 paragraph reads:

5 "Ms. Farnsworth and Mr. Ward told the
6 Board that the purpose of the undertaking
7 as defined by the proponent is distinct
8 from the purpose of the EAA, which is, in
9 part, to provide for the protection,
10 conservation and wise management in
11 Ontario of the environment. In their
12 view, the Board may only make changes to
13 the purpose defined by the proponent if
14 the proponent agrees with the changes."

15 And I would submit that's a clear
16 indication that the Ministry of the Environment
17 witnesses did not feel that the Board had unfettered
18 rights or any rights to unilaterally make changes to
19 the statement of the purpose.

20 THE CHAIRMAN: But that still may leave
21 you with a natural justice problem.

22 MS. BLASTORAH: I'm not sure I
23 understand.

24 THE CHAIRMAN: Even if the proponent
25 agreed to a change in purpose, it doesn't necessarily

1 mean that the notice given to the outside world at
2 large was adequate.

3 MS. BLASTORAH: I agree, Mr. Chairman,
4 and certainly that would be a problem for the proponent
5 and I would submit -- perhaps I will go on to another
6 point I intended to raise later.

7 Mr. Dahme had at one point referred to
8 the portion of the judgment that deals with the
9 business mandate of the proponent, in this case
10 designated a private undertaking because the proponent
11 was not a government body. He indicated that the Board
12 had commented it would be inappropriate for a proponent
13 of that type, a private proponent to describe the
14 purpose in terms of their business mandate and the
15 Board goes on, and I will just refer you to the page.

16 Page 30 of the decision the Board
17 indicated there that in the Board's opinion it would be
18 inappropriate for proponents to essentially avoid the
19 requirements of the Act, to call adequate evidence with
20 regard to alternatives to the real function of the
21 undertaking, real purpose by stating the purpose to be
22 more limited than the real purpose; in other words, by
23 stating the purpose to be only their business purpose
24 and, as Mr. Dahme indicated, the business of producing
25 energy for money.

1 The reason I raise that is because the
2 Board makes the following comment in relation to that
3 situation, if that were the case, if private proponents
4 were allowed to narrowly state their purpose - I am
5 quoting from the last sentence in the first paragraph -

6 "...Municipalities would be encouraged to
7 contract out their contentious projects
8 to avoid the requirements of the
9 government approval process."

10 The reason I raise that in response to
11 your question, I would suggest that the proponent would
12 be met exactly in that statement with a natural justice
13 argument.

14 If the Board found on reviewing the
15 environmental assessment that the alternatives or
16 alternative methods had not been met because of the
17 statement of the purpose, the proponent would be met
18 with precisely that problem. They may well face
19 rejection of the environmental assessment or refusal of
20 approval and would have to go back and restate their
21 purpose more broadly in order to avoid that eventually,
22 which would put them in a situation, potentially
23 disasterous with the problems.

24 And I would submit that's a very, you
25 know, highly-effective disincentive to proponents that

1 narrowly state their purposes. When that's the result
2 they could face, there is no incentive for a proponent
3 to enter into a long hearing, especially one of this
4 length, starting out by trying to avoid the
5 requirements of the Act by narrowly stating their
6 purpose, when the result of doing that may well be to
7 go back to square one, serve notice, and start all over
8 again.

9 MRS. KOVEN: Excuse me. Let's take a
10 look at the so-called notice problem in the context of
11 this hearing. Why would any new parties coming into
12 the hearing - and I would question how many new parties
13 would come into this hearing, I think you would really
14 have to beat the bushes to get a large number of new
15 parties coming in even if you expanded the definition
16 of the purpose very, very broadly - but setting that
17 aside, what would make the position of a new party
18 coming into the hearing any different than the position
19 of a party who will be attending satellite hearings who
20 are faced with looking up information in transcripts
21 exceeding heaven knows how many thousands of pages by
22 the time we get to those hearings, people who couldn't
23 afford to attend full time and, in effect, have some
24 participation with the hearing, but certainly not full
25 participation and probably in no way more fully

1 informed than new parties coming in.

2 MS. BLASTORAH: Well, Mrs. Koven, I would
3 like to respond to that by making a couple of comments.
4 First of all, the Board and certainly the parties have
5 no way of knowing how many parties would have been
6 involved had the purpose been stated differently, so I
7 think to state at the outset that it's not really a
8 problem because probably there wouldn't be very many
9 people anyway.

10 I think that is something that we
11 couldn't possibly know and it would be prejudging that
12 issue to make the decision as to whether or not notice
13 is a problem based on that. And I would also submit
14 that even if one person is disadvantaged, that may well
15 be enough. If there is one person who feels they will
16 be drastically affected by this or feels they have been
17 denied the opportunity to appear before this Board and
18 participate to the extent they desire, that is enough,
19 natural justice has been denied to that one person.

20 So I don't think that numbers are really
21 in issue and, again, I don't think that there is any
22 way we can know how many people would be affected and
23 that is just referring to people who aren't here. In
24 terms of the involvement of people at the satellite
25 hearings, I would submit that it's their choice to be

1 fully involved or more directly involved. They were
2 aware of the nature of the hearing, they were aware of
3 what is before the Board, and based on that they made
4 their decision that they did not want to attend full
5 time. Had the purpose been different, had the matter
6 before the Board been different, their decision may
7 have been different, they may well have been full-time
8 parties, they may well have become directly involved
9 with one of the parties who are here and that this
10 involvement of that party may, therefore, have been
11 different. So I, therefore, think all of those matters
12 are highly speculative and I think that it's in no way
13 appropriate to indicate that it might not be a problem
14 when we simply don't know.

15 Returning back to the SNC decision, I
16 think I did indicate that I disagreed with the
17 characterization put on the evidence by the Ministry of
18 the Environment as well and I would like to turn now to
19 submissions - your indulgence for a minute, Mr.
20 Chairman - some submissions by Mr. Lindgren with regard
21 to the issue of need, and I am going to be very brief
22 on this.

23 I think that Mr. Lindgren raised the
24 issue of need because he was discussing the matter
25 theoretically, as he put it, rather than in the context

1 of this hearing, and I say that because it has not been
2 my understanding of the Forests for Tomorrow position
3 to date that there is any question with regard to need
4 for the particular undertaking currently before this
5 Board.

6 The Coalition indicated in their opening
7 statements that they were not taking the position that
8 there should not be a forest industry in this province
9 and Mr. Lindgren confirmed that in Panel 17 in response
10 to some questions put to him by yourself, Mr. Chairman.
11 So I was a little confused if he was intending those
12 comments or those submissions with regard to need to
13 relate to this hearing, but he indicated he was
14 making --

15 THE CHAIRMAN: Well, I think some of
16 those comments came out in the context of trying to put
17 some meaning to the words 'purpose' and 'rationale' as
18 they may appear or not appear in the Act in the Board's
19 previous interpretations in other cases as to what
20 those words might in fact mean, but in the context of
21 other cases as well.

22 In other words, in the Redhill Creek
23 case, the purpose of the undertaking which was to
24 provide transportation from point A to point B, the
25 Board -- not the Board, one member of that Board;

1. namely, myself, felt that it was of considerable
2. importance that the need for that proposal be
3. established in the context of that case and statements
4. as to other words have appeared in other cases as one
5. of the principal rationales for the undertaking.

6. Now, whether rationale equates directly
7. to the word purpose, I won't say is debateable, but
8. there may be different connotations of the wording that
9. can be attributed to both rationale and purpose
10. because, as you will appreciate, the word need per se
11. doesn't appear in the Act, it has to be imputed more or
12. less from words like rationale and/or purpose and, in
13. some cases, the regulations in those days, the
14. instructions for completing Form 1 I think it was
15. called--

16. MS. BLASTORAH: Yes.

17. THE CHAIRMAN: --for an environmental
18. assessment where the need in fact was used. So I would
19. just put to you that Mr. Lindgren was canvassing the
20. concept of need perhaps in the abstract, in the sense
21. that they have not questioned to my recollection - I
22. think you are correct - the need for a forest products
23. industry in this province in the context of this
24. undertaking.

25. MS. BLASTORAH: Right. And I just wanted

1 to clarify, Mr. Chairman, that it is in that more
2 abstract context that I am responding to his
3 submissions because my understanding is it's not an
4 issue in this present hearing before the Board.

5 So addressing his comments in the
6 abstract, I would agree with the submissions made by
7 Ms. Seaborn on behalf of the Ministry of the
8 Environment and I would simply refer to an earlier
9 decision you -- or Ms. Seaborn referred to the Redhill
10 Creek decision and you have just referred to it now,
11 Mr. Chairman.

12 There is an earlier decision in 1981 from
13 the environmental decision of the Environmental
14 Assessment Board in relation to the proposed new
15 highway to extend Highway 89, and at page 14 of that
16 decision, I don't -- I only have one copy of the Act
17 here, I believe that it's in MOE's book of authorities.

18 MR. FREIDIN: Tab 1.

19 MS. BLASTORAH: It's tab 1, Mr. Chairman,
20 in the Ministry of the Environment's book of
21 authorities, which is page 14 of the decision. And
22 consistent I think with the comments you made this
23 morning, Mr. Chairman, that need may not always be the
24 deciding factor but certainly it would be -- I think
25 you stated something to the effect that it would be

1 unlikely that if need were not demonstrated approval
2 would be granted, although that may not in every case
3 be so.

4 THE CHAIRMAN: And that it would be
5 unlikely if need can't be demonstrated that it would be
6 in the public interest.

7 MS. BLASTORAH: Precisely.

8 THE CHAIRMAN: Or words in the crazy way
9 it's worded in the Act, it might be not be in the
10 public's interest. I often wondered why they describe
11 it in the negative as opposed to the positive for some
12 reason. Maybe it's a rule of statutory interpretation
13 I am not aware of, but...

14 MS. BLASTORAH: You almost have to use
15 double negatives.

16 THE CHAIRMAN: It would almost be easier
17 to describe it in terms of the positive in terms of
18 people reading that interpretation. However...

19 MS. BLASTORAH: I would simply like to
20 follow up on that comment from you, Mr. Chairman, this
21 morning by referring to page 14 of this Highway 89
22 case, and I am looking at the first paragraph on the
23 page which is a partial paragraph starting about
24 halfway through beginning with the words:

25 "Since the purpose of the Act..."

1 Or perhaps even beginning a sentence
2 earlier. I would simply read the following passage:
3 "The Act under Section 5(3)(d) requires
4 an evaluation of advantages and
5 disadvantages of the undertaking to the
6 environment before an environmental
7 assessment can be accepted. Since the
8 purpose of the Act is the betterment of
9 the people of the whole or any part of
10 Ontario it follows that in order for
11 approval to an undertaking to be given
12 the advantages must outweigh the
13 disadvantages. In other words, between
14 the satisfaction of need and the costs
15 incurred to satisfy the need, the scale
16 must tip in favour of the former."

17 And the reason I refer to that passage,
18 Mr. Chairman, is I think following up on comments by
19 you both in the Redhill Creek dissent and this morning,
20 that the Board may well look at the issue of need and
21 however that relates to purpose in determining whether
22 the effects of the undertaking are acceptable or not.

23 It does not mean that the Board considers
24 changing that purpose or need, but simply says: Does
25 the need for this activity to proceed justify our

1 accepting any negative impacts to the environment as
2 described in the Act. And the reason I make that
3 comment is because Mr. Lindgren raised the issue of
4 need.

5 I would just like to make it clear that
6 it's not the Ministry of Natural Resources' position
7 that the Board cannot consider need, I would submit
8 that the Board can consider need in relation to
9 acceptability of the undertaking in terms of advantages
10 versus disadvantages and can consider purpose in that
11 sense.

12 So simply taking the position that the
13 Board does not have the jurisdiction to change the
14 purpose does not remove the ability of the Board to
15 review the need for the undertaking. So any argument
16 that the two are somehow synonymous and if the Board
17 can look at need, it can change the purpose I think is
18 fallacious.

19 Could I just have a moment, Mr. Chairman.
20 I think those are all of my submissions.

21 One brief comment, Mr. Chairman, with
22 regard to the hypothetical that Mr. Lindgren put
23 forward this morning, and perhaps in response I could
24 put a hypothetical of my own.

25 He indicated that in a situation where a

1 factory -- an existing factory proposed to build an
2 energy from waste facility and would draw for raw
3 material for that facility from its own waste and
4 perhaps the waste of surrounding factories and so on,
5 and I believe he indicated that if the municipality --
6 the local municipality became a party to the
7 environmental assessment of that undertaking the Board
8 could impose a term and condition with regard to the
9 use of municipal waste being a more appropriate source
10 of supply and that would have spinoff effects; in other
11 words, the municipality could achieve its objectives
12 through the construction of that facility.

13 And I would just like to indicate that it
14 has always been the position of the Ministry of Natural
15 Resources that there can be and are spinoff benefits as
16 a result of the carrying out of the undertaking of
17 timber management, those are positive effects of the
18 carrying out of that undertaking. That does not mean
19 that those purposes, for which that undertaking is
20 carried out in the same way that in the hypothetical
21 put forward by Mr. Lindgren, the fact that an existing
22 central facility decides to build an energy from waste
23 plant for their own purposes and the municipality
24 decided that it would help their ends to supply garbage
25 or waste for that facility, and the Board thought that

1 was appropriate and imposed a term and condition that
2 would in no way change the purpose for which that
3 factory intended to build that facility, it would be a
4 benefit that the municipality --

5 THE CHAIRMAN: But there always has to be
6 benefits--

7 MS. BLASTORAH: Precisely.

8 THE CHAIRMAN: --in terms of carrying out
9 the activities or it wouldn't be approved.

10 MS. BLASTORAH: Precisely.

11 THE CHAIRMAN: On the tradeoff basis in
12 the first place; in other words, the impacts to the
13 environment would be negative not outweighed by the
14 benefits to the environment and consequencely denied on
15 that basis.

16 MS. BLASTORAH: That is exactly the
17 point, Mr. Chairman, that merely saying the Board can
18 look at positive effects or positive benefits which may
19 accrue from the carrying out of the undertaking does
20 not mean that the Board should include those positive
21 effects as reasons for which that undertaking is being
22 carried out.

23 And if I can use a somewhat facetious
24 hypothetical of my own perhaps, this morning Mr. Cosman
25 indicated that he had found another use for your book

1 when he didn't have a podium, and I would suggest that
2 that is something that served his purposes at the time,
3 but it was not very likely the reason for which you
4 wrote that book.

5 THE CHAIRMAN: But it's environmentally
6 acceptable.

7 MS. BLASTORAH: It's environmentally safe
8 and a spinoff benefit of the fact that you wrote that
9 book for your own purposes.

10 I think those are my submissions, Mr.
11 Chairman. In closing I would just like to indicate
12 that our order as requested is set out in the factum
13 and I won't read that into the record.

14 THE CHAIRMAN: Thank you.

15 MRS. KOVEN: I have one question, Ms.
16 Blastorah.

17 MS. BLASTORAH: Yes.

18 MRS. KOVEN: And that is a matter that
19 Mr. Dahme raised this morning, and I think I remember
20 him saying he was concerned about the way the purpose
21 was defined because it was limited and it made
22 non-timber values seem not to be treated seriously,
23 something to that effect.

24 What I take him to mean is a situation
25 where, because the definition of the purpose, which is

1 the first thing we see in the EA and the first thing we
2 see in any aspect of this case, is solely to provide
3 timber for the industry, you would have a situation
4 where local foresters in working in the field designing
5 or carrying out timber management plans would come to
6 that sort of situation that we have talked about so
7 often in the past; and, that is, where they had a
8 decision to make about whether to use something as a
9 timber resource or use it in another way, and the
10 message that would be in their minds and a paramount
11 message would be the purpose of what they were doing
12 was to provide timber and that non-timber resource
13 would become a secondary concern.

14 Now, that assumes that the parties don't
15 negotiate successfully terms and conditions or that the
16 Board doesn't accept arguments for terms and conditions
17 to protect non-timber resources. But I think that is
18 what he was getting at, and I didn't hear you address
19 that directly in your comments.

20 MS. BLASTORAH: Well, I would like to
21 take the opportunity to do so now, Mrs. Koven.

22 I think that the answer to that is quite
23 simple, and I think it has been stated many, many times
24 in the evidence of the proponent during their case, and
25 that is simply that the forester is not the only one

1 that makes that decision. The forester may well come
2 to that decision with his paramount objective being the
3 continuous and predictable supply of wood, however,
4 those decisions are made as part of the timber
5 management planning process and there are other people
6 involved in that process. There is a planning team
7 which consists of people with other different
8 objectives, there are representatives of the fish and
9 wildlife branch, there may in some cases be tourism
10 representatives, there are many, many other values that
11 can be, in appropriate situations, and are regularly
12 represented during the planning of the operations and
13 the decisions as to how those will be carried out and
14 where and when.

15 And I would suggest that the evidence has
16 been that those people come with their own objectives
17 in mind. For instance, the fisheries representative
18 comes with his fish management objectives or her fish
19 management objectives in mind, similarly with the
20 wildlife management, those people come to that table
21 not with the objective of providing a continuous and
22 predictable supply of wood but of implementing and
23 working toward their own objectives.

24 And you have heard Dr. Euler say many,
25 many times: Judge us by our objectives. He has

1 indicated many times that the Ministry has wildlife
2 objectives and that the principal way in which those
3 are carried out is not exclusively timber management
4 but that those people participate in the timber
5 management activity and the planning process in order
6 to assist in achieving their own objectives:

7 THE CHAIRMAN: But is it not reasonable
8 to assume that regardless of how you define the
9 purpose, even it were a broadly defined purpose, the
10 production of timber management plans will have to be
11 in a large sense carried out by foresters because they
12 are the ones that deal with that particular resource,
13 but in the context of other uses of the forest you have
14 an integrated timber management planning team which
15 brings in all of the other values or interests that may
16 be out there as well as members of the public that may
17 even represent further interests that aren't specified
18 down to the expert level, maybe the lay public that
19 comes in, and unless you had a situation where the
20 actual decision-maker, in terms of the timber
21 management plan encompassed the management of every
22 single value in the forest - which I don't think, in a
23 practical sense, in one person you have, it's a
24 collective approach - then you are also going to get
25 the persons who represent a particular value putting

1 forward their point of view into the hopper of the
2 overall decision in terms of the planning process.

3 And is that not practically the way it's
4 done. You don't have a resource management structure
5 whereby one person will make the decision in terms of
6 every single value out there and is in charge of
7 managing every single value singly.

8 MS. BLASTORAH: That's right, Mr.
9 Chairman. That was the point I was attempting to make,
10 that other people are responsible for working toward
11 the resource objectives -- resource management
12 objectives in relation to those other resources and
13 those people come to the planning situation -- the
14 timber management planning situation with those
15 objectives in mind and are there to ensure that nothing
16 that is being done in terms of timber management
17 inhibits their ability to achieve their objectives.

18 So I think that, I hope, responds in some
19 measure to your question, Mrs. Koven, and I would
20 suggest that the entire timber management planning
21 process, including the area of concern process, is
22 exactly designed to ensure that those other values are
23 taken into account and that timber management is not
24 carried out at an unacceptable cost to those other
25 values.

1 MR. COSMAN: Mr. Chairman, just perhaps
2 before Mr. Dahme exercises his right of reply, if I
3 may - just since I didn't have an earlier opportunity -
4 attempt in my way also to respond to Mrs. Koven's last
5 question.

6 And I think it might be considered in
7 this context. If tomorrow this Board has to
8 consider -- has an environmental assessment on parks
9 planning before it, the purpose of that parks planning
10 process might be to enhance wilderness and recreational
11 values in the forest, that doesn't mean necessarily
12 that the other values, including the values of jobs in
13 northern communities, would be ignored by those
14 planners, but that would be described as the purpose of
15 that particular undertaking which was before the Board
16 for approval.

17 And so, in that context, yes, perhaps
18 with respect to that resource that is the stated
19 purpose, but it doesn't ignore the other values.

20 THE CHAIRMAN: Thank you.

21 Mr. Dahme?

22 MR. DAHME: I think this last discussion
23 in response to the question by Mrs. Koven raises the
24 exact issue that we are trying to address, that you
25 have a number of specialists involved in the

1. determination of the final plan, but it is the relative
2 importance of each of those disciplines and how they
3 feed into the mix that is important. And by defining
4 the purpose narrowly overwhelming importance is
5 attached to the timber management aspect. The
6 individual specialists bring to the forefront their
7 specialities, their abilities but...

8 THE CHAIRMAN: Why is that necessarily
9 so? Suppose you have the timber management values, the
10 timber values being put forward in the development of a
11 timber management plan, but suppose what is proposed in
12 the context of an individual plan is deleterious to
13 wildlife or a particular stream or fishery, et cetera,
14 presumably in the context of that planning process that
15 plan would not be approved with the impact such as
16 against another competing value that was to the extent
17 in the mind of whoever approves the plan inappropriate
18 and not environmentally acceptable.

19 I guess what I am asking, Mr. Dahme, is:
20 Why can't these other values be protected adequately,
21 particularly in the context of the process, by the
22 Board specifying in terms and conditions of approval
23 that other values shall be taken into account in
24 accordance with certain conditions and directions and
25 in the context, assuming that this application were

1 approved, in the development of an individual plan in
2 the context of those concerns being put forward in the
3 planning process, and if deemed to be appropriate in
4 terms of the values they are meant to protect,
5 protected in the ultimate plan as approved, because
6 those plans themselves -- the individual plans would
7 also contain conditions of approval which could
8 specifically address another value and likely would.

9 MR. DAHME: Okay. Mr. Chairman, perhaps
10 we could do this. What I am proposing to do is address
11 three points in reply and, with your permission, I
12 would like to have Mr. Hanna answer that question to
13 outline, I think, some confusion that has arisen out of
14 what is being sought by the Federation.

15 I think Mr. Hanna can outline on perhaps
16 a more practical perspective what is being sought on
17 behalf of the Federation. So, with your permission, I
18 will just briefly summarize three points in reply and
19 then Mr. Hanna can proceed.

20 The first is that I noticed that Mr.
21 Cosman and Ms. Seaborn both agree that this is a
22 question of law, and that is indeed what I was trying
23 to raise before the Board, that there are certainly
24 practical consequences to this hearing, but that it is
25 a question of law, of general application that we are

1 asking the Board to rule on today.

2 The second issue that arose in the
3 submissions in opposition to this motion relate to the
4 right of the proponent to obtain a decision on their
5 application. By redefining or redescribing the purpose
6 the proponent is not denied of that opportunity. So,
7 for example, in Petro-Sun SNC they were not denied of
8 the opportunity, the undertaking remained as defined
9 and a decision was made on the undertaking as it was
10 defined.

11 THE CHAIRMAN: But they might well have
12 been denied the result they sought on their
13 application. If the purpose was changed midstream and
14 they hadn't addressed that purpose in their case, they
15 might get a decision: Yes, they are obviously going
16 for approval, it might well have been a denial of the
17 application had they not met whatever tests had to be
18 met in terms of meeting or explaining or adducing
19 evidence concerning the amended purpose.

20 MR. DAHME: That is correct, and that is
21 the risk that they took even with the decision of the
22 Board by saying that purpose had changed at the end of
23 the day, that was still a risk that they had to bear.

24 THE CHAIRMAN: Well, I would only put to
25 you, Mr. Dahme, the mind reader proposition that I have

1 put forward in other cases; and, that is, these
2 assessments are proponent-generated, they start off by
3 the proponent both describing the undertaking and
4 describing the purpose and then trying to go ahead and
5 meet the requirements of Section 5(3), and the
6 proponent has no idea at the time they are putting all
7 of that together what exactly is in the minds of other
8 parties out there.

9 Those positions develop essentially
10 during the course of the hearing and if, during the
11 course of the hearing, other parties come forward and
12 say: Well, we think you didn't describe the purpose
13 appropriately and, therefore, it should be amended, it
14 may have some very devastating impacts on the way the
15 proponents cast its case and the way other parties up
16 to that point in time have cross-examined on the
17 evidence adduced by the proponent.

18 MR. DAHME: I have already indicated I
19 think in my argument-in-chief that we are not seeking a
20 redefining of the purpose in that sense, it is a
21 redescription to accommodate the evidence that has been
22 heard.

23 THE CHAIRMAN: Well, I suggest to you
24 that is a very fine line and it certainly could be -- I
25 would be surprised if at the end of the case in the

1. argument portion of the case that much wasn't sought to
2 be made by a redefined purpose in terms of whether or
3 not the proponent called the evidence that would meet
4 that purpose.

5 MR. DAHME: The third point I wanted to
6 address was just briefly the point raised by Mr.
7 Cosman, that this Board does not have the power to make
8 changes in the undertaking upon granting approval, and
9 Mr. Cosman relied on Section 14 of the Environmental
10 Assessment Act.

11 It's interesting that Ms. Eleanor Cronk
12 in dealing with a similar issue with the power of the
13 Board to determine terms and conditions suggested that
14 Section 12 gives the Board much broader powers than the
15 Minister.

16 Let me suggest that the same is true,
17 that Section 14, insofar as it applies to the powers of
18 the Minister on granting approval, specify what
19 specific powers he has. The powers to the Board under
20 Section 12 are indeed much broader.

21 THE CHAIRMAN: But will you concede that
22 the powers, regardless of what the powers are between
23 the Minister and the Board, may not be entirely
24 coincidental?

25 MR. DAHME: Yes, yes, that's true. Now,

1 the transcript reference for Ms. Cronk's submissions
2 are Volume 158 pages 27578 and 9.

3 And the last point is just this question
4 of denial of natural justice and failure to give notice
5 to affected parties.

6 Mr. Chairman, the form in which we are
7 seeking to have the purpose redescribed would, in our
8 view, not change the purpose of the undertaking
9 sufficiently that parties who are not already a party
10 to the hearing would be or who have not already
11 indicated their desire to participate would likely to
12 be indicating that they would like to participate. It
13 is a point of speculation, but...

14 THE CHAIRMAN: Well, it's speculation to
15 the point that you may not object to that. There may
16 well be a party out there that just takes such
17 objection, runs off to the Divisional Court and says:
18 Look, we didn't have notice of this purpose as now
19 redefined by the Board and we didn't have an
20 opportunity to participate from day one.

21 And it may well be the view of the court,
22 it certainly has been in other cases, not necessarily
23 related to environmental assessments but in
24 administrative law in general, that those kinds of
25 problems can sometimes be fatal and go to the very

1 jurisdiction of the Board in terms of whether or not it
2 can proceed on without going back to square one or
3 whether or not, if a decision has been rendered, the
4 decision should be quashed.

5 MR. DAHME: As I have indicated, Mr.
6 Chairman, we are not seeking a change in the
7 undertaking, only the purpose for which the undertaking
8 is proceeding, and it would be my view that the denial
9 of natural justice would be likely to occur in the
10 change of the undertaking, not necessarily the purpose.

11 THE CHAIRMAN: Well, maybe.

12 MR. DAHME: Perhaps Mr. Hanna could
13 briefly address these questions, the practical
14 implications in terms of the evidence of the
15 Federation.

16 MR. HANNA: Mr. Chairman, perhaps to
17 start I would say that the reason that we asked Mr.
18 Dahme to come here today was because the motion we put
19 forward to the Board was one that we had viewed as a
20 matter of law and we felt that the Board would best
21 benefit by having someone who would be able to provide
22 that opinion to you, and that is the reason we had Mr.
23 Dahme come forward.

24 The Board's questioning, however, has
25 gone far beyond the matter of law and has gone to the

1 substance of the case itself and the evidence that my
2 client is proposing to adduce and the evidence that has
3 been presented to the Board so far, and I think the
4 Board will appreciate the difficulty Mr. Dahme is faced
5 with in terms of trying to provide the proper context
6 to those answers, and I will try to do that for you at
7 this time.

8 Perhaps it's -- I will not attempt to
9 respond to any of the points of law that have been
10 raised, that is Mr. Dahme's purpose and I am certainly
11 not going to try and change that in any way whatsoever.

12 However, I believe Ms. Blastorah's
13 presentation, Ms. Seaborn's presentation particularly
14 dealt to a large extent with the substance of the case
15 rather than the motion in terms of the legal side of
16 it, and I would like to respond to those, if I might.

17 Starting first with Ms. Blastorah. She
18 suggested that Mr. Williams in his opening statement
19 had indicated that my client is of not the view that
20 the full range of resource management activities should
21 be within the purview of the Board at this hearing and
22 that Mr. Dahme had also made that statement and that
23 the proposed change in the purpose of the undertaking
24 was inconsistent with those statements. I disagree
25 totally with that.

1 First of all, our position has not
2 changed, we do not believe that this Board should be
3 passing judgment on the full scope of resource
4 management decision-making that takes place on Crown
5 land and we have no intention of trying to bring that
6 within the purview of the Board. Likewise, we do not
7 see the purpose itself leading to the broadening of the
8 scope in any way whatsoever that would be inconsistent
9 with those statements.

10 And might I draw specific to your
11 attention the wording - and I suggest to you it's a
12 draft wording, very initial wording - I would also say,
13 perhaps just as an aside, I am somewhat troubled that
14 we are arguing at this time without us having had the
15 opportunity to present our evidence supporting the
16 rationale for the purpose and the redefinition of
17 purpose that is coming forward, and I will speak to
18 that further in a moment.

19 THE CHAIRMAN: Well, I am a little
20 troubled by your last statement. But what do you mean
21 by your last statement?

22 MR. HANNA: Well, Mr. Chairman, as I
23 understand it, there is interpretation being made as to
24 the rationale and the reason why we are redefining or
25 suggesting that a redefinition of the purpose might be

1 appropriate and what that redefinition might mean and
2 what the implications are. We have yet to provide any
3 environmental evidence, planning evidence to this Board
4 in terms of our interpretation of what that purpose
5 would mean and --

6 THE CHAIRMAN: Mr. Hanna, we are simply
7 trying to adjudicate in terms of this motion on your
8 proposal to the Board that (a) it has the jurisdiction
9 to amend the purpose and, (b) the Board sought
10 clarification, if it did agree with that proposition,
11 what would your client wish to amend the purpose to,
12 and Mr. Dahme put forward a two-pronged suggestion,
13 although indicating clearly he wasn't arguing nor
14 asking for that specific amendment at this time, but
15 that would be the type of amendment that would be
16 sought perhaps at a later date.

17 Now, we are taking that into account as a
18 clear indication as to what the description you are
19 proposing for the purpose might be and that proposed
20 description, in the Board's view, has certain
21 implications in the context of this motion because we
22 have to view what that proposal is in the context of
23 where we are to date in this hearing, and that brings
24 into play all kinds of questions, both jurisdictional
25 questions, questions relating to natural justice and

1. procedural fairness, and questions relating to what the
2 position of other parties are and were during the
3 presentation of the proponent's case.

4 So it is not a matter of trying to
5 prejudice your case prior to you putting it in, it is a
6 matter of attempting to assess the implications of what
7 you are seeking from this Board, and that is a
8 redefinition of the purpose other than what was
9 described by the proponent in the context that we have
10 the jurisdiction at law to do so.

11 So we are going no further than that. We
12 are not presupposing what you are going to call. We
13 have had some indications throughout the course of the
14 last 20 months from your own lips and those of your
15 respective counsel as to what you intend to call, so we
16 are not going along that road entirely in the dark
17 trying to guess what you are going to call. You have
18 indicated on several occasions the areas that you
19 intend to address in your own case.

20 So I think you are misdescribing both the
21 Board's prejudging your case today, and I don't think
22 any of the other parties have been guilty of that
23 either.

24 MR. COSMAN: Mr. Chairman, I have an
25 objection if my friend intends to pursue this. It is a

1 question of reply at this time. We are not dealing
2 with argument, unless we want to start a whole round
3 all over again.

4 THE CHAIRMAN: That's right.

5 MR. COSMAN: And my friend doesn't have
6 to feel in the context of the argument that he has to
7 justify the definition that been put forward. I have
8 made no submissions with respect to that definition as
9 such, that is not an issue before you, and I think we
10 can be here all afternoon arguing something on a motion
11 when that issue is not before you.

12 MR. HANNA: I certainly accept Mr.
13 Cosman's objection, Mr. Chairman, in the respect that
14 we are not here to argue the merits of the alternate
15 proposal or alternate possible formulations of purpose
16 and it's not my intent to do that.

17 I would, however, note that a number of
18 Ms. Blastorah's comments dealt specifically with the
19 interpretation that should be assigned to that. And to
20 give you an example, the one I've just gone through,
21 that the stated purpose was inconsistent with previous
22 comments that have made at this hearing. And I suggest
23 to you, while I respect very much what Mr. Cosman has
24 said, I believe that that in fact is dealing with the
25 interpretation of the purpose as it was brought forward

1 this morning.

2 THE CHAIRMAN: But I thought Ms.
3 Blastorah was referring to the purpose as defined by
4 the proponent and as commented on by your counsel
5 earlier on.

6 MR. HANNA: With respect to the new
7 purpose supposedly that was now being brought forward
8 and that that new purpose was inconsistent with
9 comments that had been made earlier by Mr. Dahme and by
10 Mr. Williams. That's my understanding of her
11 statement.

12 MS. BLASTORAH: Well, Mr. Chairman,
13 perhaps I can clarify because certainly my submissions
14 were with regard to the effect of changing the purpose
15 to anything, and I was certainly using the proposal put
16 forward by Mr. Dahme on behalf of the Federation as a
17 hypothetical example of one situation that might occur
18 if that purpose were changed into that -- in accordance
19 with that hypothetical.

20 Certainly I could have argued on the
21 reasons of another hypothetical and perhaps that would
22 have given Mr. Hanna less discomfort, but since we had
23 one hypothetical before us I elected to use that. I
24 mean, certainly my comments were addressed in the
25 abstract and whether or not Mr. Hanna ultimately puts

1. that statement that was made by Mr. Dahme this morning
2 forward as the Federation's proposal as to any
3 amendment that should be made to the purpose, I have no
4 way of knowing that and I certainly didn't intend to
5 make my argument in that regard today.

6 I was only commenting on that proposal as
7 a hypothetical situation to demonstrate some of the
8 consequences that could result from changing the
9 purpose in any way.

10 MR. HANNA: Well, Mr. Chairman, my words
11 that I have written down here were there was an
12 inconsistent position and the reference that she gave
13 with respect Mr. Williams' earlier opening statements
14 and with the purpose because with the new definition or
15 the draft definition of purpose as brought forward, it
16 would expand the undertaking to deal with those matters
17 that Mr. Williams has said would not be part of this
18 hearing. And that was my interpretation. If that
19 isn't correct, then fine.

20 Her next point was to say that with the
21 new definition of purpose, that it would lead to a more
22 broader scope of evidence that would have been brought
23 forward by the proponent, that it would have had to
24 deal with a whole variety of matters in terms of fish
25 and wildlife and I believe she made reference to Dr.

1 Euler and the evidence that he would have adduced if
2 that had been on the table and, again, I submit that
3 that was responding specifically to this draft purpose
4 that had been brought forward and what the implications
5 of that are.

6 MS. BLASTORAH: Mr. Chairman, I would
7 only comment that in fact those submissions were made
8 in response to a question from the Board as to what, if
9 any, changes such a purpose would have required in
10 terms of the evidence to be called by the proponent,
11 and it was in that context that I made those
12 submissions.

13 MR. HANNA: Mr. Chairman, it is our
14 submission then to clarify that, that we are not asking
15 at this time for you to amend the purpose in a specific
16 way, simply to get a ruling whether or not you have
17 that authority. And if we do come forward, it is not
18 our intent to change the scope of the hearing in terms
19 of expanding it that would be inconsistent with any of
20 the statements we have made in the past and that is
21 certainly not the intent in any way whatsoever.

22 I would also draw to your attention this
23 matter of notice, that certainly I can conceive of
24 redefinitions of purpose such that the nature of the
25 undertaking, the nature of the matters that are before

1 this Board would be of such a different focus that, in
2 fact, the concerns that the Board has in termd of
3 natural justice could in fact be realized.

4 However, I would submit to you that it's
5 a matter of degree and to give you an example. If the
6 Board were to - we seem to be dealing with
7 hypotheticals here - if the Board were to decide that
8 instead of the purpose being to provide a predictable
9 and continuous supply of wood that it were to be
10 provide a predictable supply of wood and delete 'and
11 continuous' would that in fact require new notice, and
12 I would submit to the Board I find that very difficult
13 to believe, that that would be the case.

14 THE CHAIRMAN: Well, I am not a hundred
15 per cent sure you are right on that, Mr. Hanna.

16 MR. HANNA: Well, fine, Mr. Chairman.

17 THE CHAIRMAN: But you see, that's the
18 kind of question that would not only be of concern to
19 this Board, but I would suggest be of concern to other
20 bodies as well with the ramifications that if you are
21 wrong, then you are back at square one.

22 It is a very serious matter in the sense
23 that you are dealing with issues going to the root of
24 jurisdiction and you are going to issues which impact
25 directly on the actual fairness or, more importantly,

1 probably perceived fairness of the process in terms of
2 how it was brought before the public and how the public
3 were invited to participate.

4 MR. HANNA: Mr. Chairman, I accept that
5 and I agree that it's a matter of discretion and
6 obviously something the Board has to take very careful
7 consideration of because of the potential risk involved
8 and I am sure that the Board will do that.

9 I would, however, note to the Board that
10 you are faced with the risk in making terms and
11 conditions. It is possible that you could make terms
12 and conditions such that the nature of the undertaking
13 would in fact be essentially manipulated through the
14 terms and conditions such that in fact you likewise
15 could have that same sort of a problem.

16 And I think in fact this was one of the
17 issues that was raised in the Eastern decision in terms
18 of alternative methods and, in fact, you can even get
19 into that situation with approval of alternative
20 methods, that you have to be careful even in that
21 situation not to violation the need for proper notice
22 and to avoid that such a miscarriage in terms of
23 natural justice, so I think that's prevelant throughout
24 many of the things that the Board is faced with and I
25 in no way underestimate the significance of that, and I

1 certainly hope the Board -- I'm sure the Board doesn't
2 either.

3 There was a matter raised by Ms.
4 Blastorah as to whether or not this matter affected any
5 of the evidence that we were going to bring forward or
6 might bring forward in terms of its relevancy. And I
7 would refer you back to how this whole matter first
8 came before the Board and that was in my
9 cross-examination of Panel 15. I was cross-examining
10 Mr. Bisschop at that time, I was asking him questions
11 with respect to alternative formulations of the purpose
12 and what the implication might be in terms of decisions
13 that might be reached with respect to a particular
14 paper, and I believe it was a paper by Mr. Oppen at
15 that time.

16 It was at that time, Mr. Chairman, I
17 believe that you interjected and said - I'm sorry I
18 don't have your exact words - but it was basically: Is
19 this within the jurisdiction of the Board to look at
20 the matter of purpose and is this an appropriate line
21 of cross-examination. It was at that point I believe
22 that we had some discussion and it was agreed that this
23 matter should be resolved as quickly as possible to
24 avoid any further misunderstanding of this nature.

25 I would suggest, however, that as a

1 result of that I was not allowed to pursue that line of
2 questioning and, in fact, subsequent to that at a
3 scoping session, I believe it was a scoping session for
4 Panel 17, I undertook to the Board not to cross-examine
5 Panel 17 with respect to the matter of purpose until
6 the clarification of this motion, for the reasons that
7 were stated at that time, and I believe the reasons
8 were that Mr. Freidin had indicated to you that if the
9 Board were to rule that it has the power to amend the
10 motion -- or amend the purpose, excuse me, that he
11 would likely wish to adduce additional evidence to deal
12 specifically with that matter, and I agreed at that
13 time on that understanding, that should that occur that
14 I would then reserve those questions for that time.

15 So I would simply bring to the Board's
16 attention that this has in fact affected the line of
17 questioning that I have been able to pursue so far in
18 terms of cross-examination, in terms of this particular
19 matter and, therefore, it does have an impact on the
20 types of cross-examination I will pursue in the future
21 and--

22 THE CHAIRMAN: Well, Mr. Hanna --

23 MR. HANNA: --the evidence I will adduce.

24 THE CHAIRMAN: Mr. Hanna, yes, it does in
25 the sense that if there is a defined purpose and a

1 defined undertaking, that any question that anyone may
2 with wish to ask on any subject that is somehow
3 periph -- I always had trouble with that word -
4 peripherally related to what's before the Board, is it
5 relevant.

6 Now, if it is not relevant to both the
7 undertaking and the purpose as defined, and that is the
8 position taken by the Board in that it does not have
9 the jurisdiction to amend the purpose if that is
10 ultimately the decision on this motion, then your
11 questions along that line may not be allowed on that
12 basis.

13 You know, we have to realize that we have
14 to conduct this hearing within the context of the
15 application before the Board, the undertaking as
16 described before the Board and the purpose as put
17 forward before the Board or amend it if the Board does
18 in fact have the jurisdiction to do so. And when we
19 embark on areas that the Board feels is not conducive
20 to its decision-making function in the context of the
21 application before it, then we will rule out certain
22 portions of questioning as not being helpful to the
23 Board's decision or the Board's duty to provide a
24 decision in the context of the application.

25 It is not a free-for-all in the sense

1 that anything can be asked and just because the purpose
2 is defined one way parties should be allowed to pursue
3 any avenue that they choose period. We still want to
4 make sure that this hearing proceeds along the lines
5 that will enable us to make an informed decision on the
6 application before us and to deal appropriately with
7 whatever matters we consider necessary in terms and
8 conditions, and also to adjudicate on whether or not
9 the application itself meets the test, the statutory
10 requirements of the Act.

11 So you are now before the Board on the
12 motion with respect to whether or not the Board has
13 jurisdiction to amend the purpose and if the Board
14 should so rule, then perhaps we would have to revisit
15 your questioning and allow you the opportunity to put
16 those questions that you wish to put forward in Panel
17 16 to witnesses if necessary.

18 And that, as I understand it, Mr.
19 Freidin, was the basis upon which we left this back in
20 Panel 15, that we were not going to decide at that
21 time, because we wanted to hear formal submissions from
22 all of the parties, on the Board's jurisdiction to
23 amend the purpose and if we should rule in your favour,
24 then perhaps questions that you were prevented from
25 putting forward at that time would be allowed in

1 accordance with the Board's ruling.

2 MR. FREIDIN: I think, Mr. Chairman, the
3 comment wasn't -- in terms of asking questions of
4 Ministry witnesses, it would not be by way of recalling
5 Ministry witnesses for that purpose, but would rather
6 be questioning Ministry witnesses in reply.

7 THE CHAIRMAN: Yes. I am not dealing
8 with whether the panels would come back now or whether
9 it could be dealt with appropriately in reply.

10 But the point being, this party's rights
11 would be preserved to canvass that area should the
12 Board rule on this motion in that party's favour.

13 MR. FREIDIN: I just didn't want you to
14 say that we were going to reopen our case.

15 MR. HANNA: Mr. Chairman, continuing on.
16 It was then raised by the Board, and I think quite
17 rightly, what's the practical significance of the
18 potential redefinitions of the purpose in terms of this
19 hearing, and while I appreciate the Board's concerns
20 there, and I think it's obviously in terms of
21 expediting the process, we don't want to sit here and
22 talk about philosophical things that haven't got a
23 direct relevance to the case, it does cause me some
24 concern and I am quite honestly in a bit of a dilemma
25 in terms of how to respond to it given Mr. Cosman's

1 comments, which I think are appropriate in that there
2 is a point of law that is supposedly being dealt with
3 and yet the practical implications are going to be
4 dealt be at the same time.

5 I guess from my client's point of view --

6 THE CHAIRMAN: Let me just respond to
7 that just very briefly. When the Board or a court
8 responds on a question of law, the law has to be placed
9 in some kind of context. It is very difficult often to
10 respond generically to a question of law without some
11 kind of context in which that law has to be applied as
12 determined and so in determining questions of
13 jurisdiction, Mr. Hanna, you do have to take into
14 account the context in which those questions arose
15 because one case can easily be distinguished from
16 another on the facts or on the circumstances; you may
17 have a law that says one thing but it may not apply
18 equally to all sets of circumstances.

19 MR. HANNA: I certainly accept that, Mr.
20 Chairman, and I understand and, as I think I mentioned,
21 I certainly understand the Board's concern in wishing
22 to put this in that type of a context.

23 The difficulty I have is in terms of how
24 far I take that in explaining to you what the practical
25 implications are. The concern that we have, and

1 perhaps I can succinctly say it in three points, is
2 that we believe the facts of the case at the end of
3 this -- the evidence that's produced will clearly show
4 that the four activities that comprise the undertaking
5 have benefits, in Ms. Blastorah's words were spin-off
6 benefits, and I would say they can also be viewed as
7 central benefits; in other words, the activities have
8 multiple benefits to them. And I believe Dr. Euler, as
9 recently as his evidence in Panel 17, to a question
10 from yourself as to what the implications would be if
11 there wasn't timber management in terms of wildlife
12 management, said we wouldn't be able to do anything.

13 And I think the significance of what he
14 was saying is that the way that wildlife habitat
15 objectives are achieved through those four activities,
16 the way that we achieve access to Crown land is through
17 those four activities, the whole variety of objectives
18 that we achieve through those activities is the
19 fundamental concept of integrated resource management,
20 that we have multiple objectives that we achieve and
21 the purpose, as it stands now, suggests that we achieve
22 one purpose through those four activities.

23 And it is our submission that, in fact,
24 if you will, the corporate veil being pierced will show
25 that there are multiple objectives being achieved by

1 those four activities, and that is one of the central
2 thrusts of what we are bringing forward.

3 The second is the matter that Mr. Dahme
4 has touched on and that is the matter of priority or
5 significance that is given to the purpose in terms of
6 making individual management decisions. Certainly I
7 agree with the Board that through terms and conditions
8 other values can be protected, but I would emphasize
9 the word protected. There is a difference between
10 protection and management, particularly if you are
11 getting benefits. I could say I can protect timber and
12 have wildlife habitat management, it leads to quite a
13 different result and this, I believe, is the basic
14 thesis that Dr. Baskerville brought forward to this
15 Board; and that is, by setting up a series of
16 objectives and working towards them rather than a
17 single objective in treating other concerns as
18 constraints, you will end up in a quite different
19 management environment.

20 And I believe the evidence, as I said,
21 will show that timber management, the activities that
22 you are being asked to approve do provide multiple
23 benefits. And if you look at the structure of the
24 draft purpose that we brought forward, I would bring
25 particular attention to the Board the fact that we talk

1 about strictly the structure of -- management of the
2 structure of the forest. We don't talk about setting
3 creel limits or hunting seasons or some other -- all
4 the other resource management levers that might be
5 brought in. We are simply talking about managing the
6 structure of the forest through those four activities
7 and the benefits that might be realized as a result.

8 The last thing that I would mention and
9 perhaps the most nebulous, but perhaps the most
10 essential element of the evidence I believe Dr.
11 Baskerville brought forward and I think is also the
12 position of my client, and that is the matter of mind
13 set. How do we deal with that perhaps overriding
14 consideration that permeates this whole matter that's
15 been brought before the Board.

16 How do we put a mind set out there that
17 will lead to the type of good things that we know are
18 possible, at least Dean Baskerville has told us is
19 possible and I believe some of the witnesses have told
20 us is possible. How do we permeate the system with
21 that type of a mind set?

22 THE CHAIRMAN: Well, the Ministry has put
23 forward their view. I would suggest all the other
24 parties will put forward their respective views and
25 your client can put forward its view.

1 MR. HANNA: I am suggesting to you from a
2 practical point of view, Mr. Chairman, one of the ways
3 that we are putting forward as a solution to that
4 problem will be the set of purpose for the undertaking
5 that clearly sets out to all those involved that this
6 is a multi-objective exercise and not a single
7 objective exercise with constraints feeding into that
8 and that --

9 MS. BLASTORAH: Mr. Chairman, I feel I
10 have to interrupt Mr. Hanna at this point, I was trying
11 not to interrupt in the middle of his sentence.

12 I do object to his characterization based
13 on the evidence that we have heard to date that there
14 is a mind set problem. He may well wish to call
15 evidence to establish that, my only objection is his
16 characterization that there is a mind set problem.
17 There is no evidence before this Board to demonstrate
18 that. And I certainly don't have any problem if he
19 wants to call evidence if he feels he can establish
20 that. I am only objecting based on the
21 characterization of the evidence to date.

22 MR. HANNA: Mr. Chairman, I hate to
23 disagree with Ms. Blastorah but I feel I have to, and
24 that is, I believe Dr. Baskerville did come forward and
25 said that in his view the major constraint to

1. implement --

2 THE CHAIRMAN: Dr. Baskerville, with
3 respect, Mr. Hanna, was a witness called by the Board.
4 Now, Dr. Baskerville was not a witness called by MNR,
5 nor called by yourself, nor called by any of the other
6 parties. The Board felt under the circumstances and in
7 view of the 1987 audit that it was appropriate to have
8 Dr. Baskerville testify and provide what assistance he
9 could to the Board; therefore, he stands as we have
10 stated before, in no different position than any other
11 witness before this Board and we will evaluate and give
12 whatever appropriate weight we wish to give to his
13 evidence as we do to all witnesses before this Board.

14 So that I think Ms. Blastorah's, just for
15 the record, objection is noted and I don't think we can
16 proceed on the basis of any mind set being established
17 one way or the other.

18 MR. HANNA: I'm sorry, perhaps I didn't
19 understand exactly her objection but it was my
20 understanding, at least of Dr. Baskerville's evidence,
21 that he saw trying to changing the mind set as being a
22 major --

23 THE CHAIRMAN: He may well have seen
24 that. You may well bring witnesses that say the same
25 thing, other parties may bring witnesses that say

1 something entirely opposite or put forward a different
2 mind set for the Board's consideration.

3 Nothing is established at this point, it
4 is all evidence before the Board which the Board will
5 weigh at the end of the case and render its decision
6 accordingly.

7 MR. HANNA: Mr. Chairman, perhaps I could
8 have a moment to consult with Mr. Dahme and we will
9 perhaps be finished.

10 ---Discussion off the record

11 MR. HANNA: Mr. Chairman, perhaps just
12 one last statement then. It has to do with the
13 Ministry of the Environment's factum and that is
14 paragraph 11 on page 5, and I would like to deal with
15 the one matter that's raised there and that is that the
16 ruling is not necessary to advance the stated position
17 of my client.

18 I disagree with that statement. In order
19 to advance the type of adaptive management approach
20 that you've heard from my lips before and unfortunately
21 or fortunately perhaps you will hear again, it is our
22 position that to implement that type of process
23 efficiently and effectively over the area of the
24 undertaking that the purpose of the undertaking -- it
25 is essential that the purpose of the undertaking be

1 redefined.

2 And for the reasons I've stated, it is a
3 central component of our case, we see this as being a
4 basis upon much of the evidence that we will bring
5 forward being based on and in that respect I think it
6 is an important ruling in our view.

7 THE CHAIRMAN: Well, in our view it is an
8 important ruling as well; on that with we agree.

9 MR. HANNA: Well, I guess I will say
10 then, Mr. Chairman, I will look forward to your
11 important ruling.

12 MR. COSMAN: Mr. Chairman, on a
13 completely separate matter with respect to the hearing
14 next week, I wonder if I may address you.

15 THE CHAIRMAN: Yes.

16 MR. COSMAN: With a little luck we will
17 be starting our case on Monday and there are just a few
18 matters where I would appreciate some guidance and
19 direction from the Board.

20 First of all, the Board had stressed its
21 hope some time ago that I would at least be able to
22 complete my first panel of evidence before the
23 negotiations start and I think given what we have heard
24 at the scoping session, that's clearly going to be the
25 case.

1 There are three days set aside next week
2 and four days the following week. We anticipate, we
3 hope without too many problems, that by the end of the
4 second day or maybe even the morning of the third day
5 we would have completed our case. With the
6 cross-examination by the parties so far that have come
7 forward, we would anticipate Tuesday we would probably
8 be completed Panel 1.

9 The question I want to raise with you
10 now --

11 THE CHAIRMAN: What date does that work
12 out to?

13 MS. BLASTORAH: The 6th.

14 MR. COSMAN: That's the 13th. And that's
15 cross-examination and re-examination. So Panel 1 would
16 be complete.

17 The question I wanted to raise with you
18 because it may have some bearing on other parties'
19 timing as well, does the Board wish me to, if I do have
20 the time for those two days, to start Panel 2 or does
21 the Board feel that it would be appropriate for the
22 parties to take those additional two days to work on
23 the bundle of terms and conditions which are now in the
24 midst of -- in the process of being exchanged amongst
25 each other before starting negotiations the following

1 Monday?

2 THE CHAIRMAN: Excuse us a moment.

3 ---Discussion off the record

4 THE CHAIRMAN: We thought it was four
5 days the first week that we were sitting.

6 MR. COSMAN: No.

7 MR. FREIDIN: It is.

8 THE CHAIRMAN: It's not?

9 MR. COSMAN: Your direction, Mr.
10 Chairman, was Monday, Tuesday, Wednesday the first week
11 and Monday to Thursday the second week.

12 THE CHAIRMAN: Okay.

13 MS. SEABORN: I think I saw your name,
14 Mr. Chairman, on a conference list for the Thursday the
15 8th.

16 THE CHAIRMAN: Oh, that's the 8th.
17 That's probably why we are sitting three days.

18 MR. FREIDIN: I think, Mr. Chairman,
19 before you decide, I was going to make an inquiry of
20 the Board as to whether it would be possible to, if not
21 completely not sit on the 15th, we could end fairly
22 early on the 15th.

23 So I would just like to add that it's
24 convenient for my purposes that we don't sit at least
25 on the 15th. You can throw that into the hopper when

1 you are deciding whether you are going to accede to
2 Mr --

3 THE CHAIRMAN: The 15th would be the
4 Thursday; is that correct?

5 MR. FREIDIN: Right.

6 MR. COSMAN: The only thing is do I
7 start.

8 THE CHAIRMAN: Well, how long is it going
9 to take you to put in the direct of two, Panel 2?

10 MR. COSMAN: Probably two days.

11 THE CHAIRMAN: Because if we could finish
12 the direct on 2, we certainly wouldn't start any cross
13 and carry over across over the negotiating session, but
14 if we could possibly finish the direct and still rise
15 at a reasonable hour on Thursday and perhaps sit later
16 on the Wednesday, if necessary, it would advance the
17 case, Mr. Cosman, and then your clients would not have
18 started cross-examination when we have the negotiating
19 session break before they were recalled for cross.

20 MR. FREIDIN: Actually, Mr. Chairman, if
21 it is just direct evidence I can absent myself and use
22 the transcripts, so that doesn't cause me a problem.

23 THE CHAIRMAN: Well, that is all we would
24 contemplate putting in prior to the break, is the
25 direct of Panel 2.

1 Mr. Martel has pointed out that we had
2 originally set the scoping session for 5:00 p.m. on the
3 7th. That would be the last day of the first week, of
4 next week, and then that would give you probably--

5 MR. COSMAN: The weekend.

6 THE CHAIRMAN: --the weekend to
7 restructure, if any is necessary, of your direct.

8 Would it be an inconvenience to any of
9 the parties if we moved that scoping session to the day
10 before at 5:00?

11 MR. FREIDIN: I am sorry, what was the
12 suggestion?

13 THE CHAIRMAN: The suggestion was to move
14 the scoping session from the 7th of Panel 2 to the
15 Tuesday?

16 MS. SEABORN: I believe the statement of
17 issues are due on the Monday in any event, Mr.
18 Chairman, so I have no objection.

19 MR. COSMAN: The only question -- I have
20 no objection. The only question would be that from
21 receipt on Monday of the statement of issues until such
22 time as the Board has had to consider it and give its
23 guidance, there may be some difficulty overnight to do
24 that while we are in the midst of evidence, but that
25 same consideration may apply on the Wednesday.

1 THE CHAIRMAN: Yes. Well, it would.

2 MR. COSMAN: Yes.

3 THE CHAIRMAN: So I think we would
4 prefer, if we might, to move the scoping session for
5 Panel 2 back one day to February 6th at 5:00 p.m. and
6 all the parties who are present today can take
7 cognizance of that, and I will arrange to have a brief
8 notice sent out to the other parties on the list.

9 MR. COSMAN: In the same vein, Mr.
10 Chairman, I don't know if it's possible, but if parties
11 can have their statements of issues to us on the Friday
12 rather than the Monday it would certainly help to make
13 that a meaningful scoping session, but I will leave it
14 because between Monday in the midst of our evidence and
15 Tuesday night we are obviously not going to have a
16 chance to look at it.

17 THE CHAIRMAN: All right. One other
18 matter that has arisen. The Board has received a
19 communication from counsel for one of the industry
20 companies indicating that since they have just had an
21 opportunity recently to look over the suggested
22 conditions of approval of OFIA, they may want to put in
23 some amendments or specific conditions to deal with
24 that particular company. And they realize that that
25 may necessitate going over the deadline we imposed

1 which was the end of this month - today I suppose - and
2 indicated that they might well be by formal motion
3 seeking leave of the Board for a brief extension.

4 The Board would like to avoid, if
5 possible, having to go through a formal motion and is
6 going to put out the suggestion that, in this
7 particular case, there is a slight -- this particular
8 company, because it is part of the Association and the
9 Association is generally putting forward the position
10 of the companies, as you will recall from the outset of
11 this hearing there was counsel who identified
12 themselves as representing specific companies and that
13 they did not intend to take part in the proceedings,
14 save and except when specific matters arose which might
15 concern their specific company in terms of a position
16 that they might want to take that was different from
17 the position being put forward by the Association.

18 In this case the fact that now they have
19 only just received the Industry's conditions of
20 approval -- and you might advise us, Mr. Cosman,
21 whether there has been consultation with each of the
22 member companies in the development of those conditions
23 and, if so, have they had an opportunity to have input
24 into those conditions separately?

25 MR. COSMAN: Mr. Chairman, the terms and

1 conditions are the terms and conditions as proposed by
2 the Association which is composed of two associations,
3 which is composed of a number of membership companies.

4 I have just also received notice of that
5 request. I intend to make enquiries to find out what
6 it is that they want and hopefully it will not result
7 in any delay.

8 THE CHAIRMAN: Right. What we would like
9 to see is, if we are going to grant an indulgence, it
10 would be a very short indulgence, a matter of three or
11 four days, to just get those conditions in if they are
12 separate from the Association's conditions and
13 distribute it to all parties, so that will not in any
14 way prejudice the negotiating session.

15 Normally, we would look very adversely
16 towards such a request because the request for those
17 conditions has been on the table in terms of deadlines
18 for serveral months but, in this particular case, this
19 one company is relying to a large extent on what you
20 have submitted and what you have submitted has just
21 come to their attention in terms of being able to
22 review it, I believe, relatively recently.

23 Is that the case?

24 MR. COSMAN: Well, it's a longer story
25 than that, but the difference -- I think it's a

1 question of time more than differences. So I think,
2 Mr. Chairman, I cannot...

3 THE CHAIRMAN: Well, would you undertake
4 to try to resolve the whole matter?

5 MR. COSMAN: Yes, I will.

6 THE CHAIRMAN: Without the Board having
7 to consider this matter formally?

8 MR. COSMAN: Yes, I will.

9 THE CHAIRMAN: Okay. We will leave it at
10 that.

11 We are proposing to start next Monday at
12 10:00 a.m. and, Mr. Cosman, one last question: Could
13 you advise us how many witnesses you will be calling
14 for the first panel so that we could set up the room
15 appropriately?

16 MR. COSMAN: Mr. Chairman, there will be
17 three witnesses on the first panel and, as I advised
18 Mrs. Devaul before Christmas, we anticipate with the
19 support people that we have, together with counsel,
20 there should be between 10 to 15 people in our party.

21 I think the Chairman asked that we advise
22 Ms. Devaul as to that. These are support people from
23 the different companies for the three witnesses as well
24 as counsel.

25 THE CHAIRMAN: And do the other parties

1 anticipate coming with a fan club as well or --

2 MS. SEABORN: Mr. Sutterfield will be
3 with me once again.

4 MR. FREIDIN: There will only be three
5 from the Ministry of Natural Resources, maybe four, but
6 three for sure.

7 THE CHAIRMAN: Mr. Hanna?

8 MR. HANNA: We may have to miss the first
9 panel, Mr. Chairman.

10 THE CHAIRMAN: Okay. All right. That
11 should give us an idea. It may be tight, but we are
12 just using this room on a very interim basis until we
13 are back here again in Toronto, and then it is the
14 Board's intention to seek other space.

15 MR. COSMAN: Mr. Chairman, then there was
16 one final matter that had to do with the procedural
17 ruling that is going to guide me in how I deal with my
18 case, and I have brought extra copies just in case you
19 didn't have it with you. (handed)

20 Mr. Chairman, I wasn't there but I have
21 carefully reviewed your decision and there was just a
22 question of clarification which may affect how I
23 present evidence, and if I can be so bold as to say
24 that the guiding decision or rather the ratio as we say
25 in law, is found on pages 6 and 7 in two sentences, and

1 there is just a question that arises from it where I
2 need some clarification.

3 On page 6 in the third last paragraph you
4 indicate:

5 "To the extent that licensing,
6 particularly with respect to forest
7 management agreements, is a part of the
8 timber management planning process, it is
9 both relevant and within the Board's
10 jurisdiction to consider."

11 And that goes to the heart of the matter,
12 Mr. Chairman, in your decision. And then over on the
13 following page in the second paragraph where you --
14 second sentence where you say:

15 "Although the Board may consider the
16 environmental impacts which may arise
17 from the manner by which MNR employs
18 licensing as a method of regulating the
19 activities which form part of the
20 undertaking, this does not confer
21 jurisdiction upon the Board to interfere
22 with existing licensing arrangements,
23 contracts or other legal obligations
24 within the discretion of the Crown."

25 And my question arises from the use of

1 the term 'existing' in that second sentence. So we
2 understand that the Board has indicated it has clear
3 authority to deal with licensing as to the extent that
4 it's related to planning. We also understand that it
5 is your decision that you can require licence holders
6 and parties to FMA agreements to comply with planning
7 requirements, to comply with the planning process that
8 you approve, and to the extent that that might become
9 part of their agreements your jurisdiction extends in
10 that sense.

11 But because of the language it maybe just
12 a question of terminology, and my question has to do
13 with the second page. We do not consider, and if we
14 are wrong that's what we need to know, we do not
15 consider that you are saying that the Board has
16 jurisdiction to take from company A and give to company
17 B or favour little over big or big over little or
18 Canadian or non-Canadian, that does not follow from
19 necessarily from the decision.

20 But we wanted to be sure, only because
21 you refer to existing licensing arrangements, contracts
22 or other legal obligations. And what we want to know
23 is whether the Board has decided by this that it
24 considers it should decide who should get licences or
25 who should be parties to agreements.

1 I don't think when you read the rest of
2 the decision it says that, but if I'm wrong it would be
3 important for us to know whether I am wrong or not.

4 THE CHAIRMAN: Well, it was not the
5 Board's view that we would be interfering with any
6 existing licences. Okay.

7 MR. COSMAN: Yes.

8 THE CHAIRMAN: Ones that are signed,
9 passed by Order-in-Council, et cetera. The Board would
10 however, in terms of how licensing is employed in
11 planning, may wish to comment in its decision as to in
12 the future when licences are entered into by whatever
13 authorities do the entering, presumably Cabinet or
14 whatever, the Minister of Natural Resources, that
15 certain considerations in the Board's view should be
16 taken into account and that may, for instance, Mr.
17 Cosman, deal with what we consider to be appropriate
18 sizes of units or other provisions that are now part of
19 FMAs that we think are important in the way the
20 resource is managed and the way the activities for
21 which approval is sought are to be carried out in the
22 future.

23 So what we are looking at is, we see
24 licensing being utilized by the Ministry as one of the
25 instruments through which management of the resource is

1 undertaken. We realize there is an existing regime in
2 terms of licences out there. We don't feel it's within
3 the Board's jurisdiction to change those, to alter
4 them; they are contracts, they have legal obligations
5 attached which have been already executed and are in
6 place, but we do not feel that in terms of approving a
7 planning process of which licensing is a part that we
8 should be prohibited from commenting on how, in our
9 view, licensing should be addressed perhaps in the
10 future in order to take into account the environmental
11 impacts arising from such.

12 MR. COSMAN: Would that go, Mr. Chairman,
13 to the question of who, and that is my point: Would
14 your considerations as to environmental impact -- I
15 think I can understand you saying that is part of the
16 planning process and could be carried through into FMA
17 agreements, but are you saying that with respect to
18 future licences or agreements that you may be
19 recommending, or you feel the Board has the power to
20 recommend that, as I said before, company A should have
21 it over company B, or the little company should have it
22 over big companies, or pulp over lump saw mills or...

23 THE CHAIRMAN: No, I don't think the
24 Board is viewing it towards as to who the licences
25 should be granted to, as opposed to other aspects of

1 the licensing agreements such as employment practices
2 with respect thereto, as to what elements of the public
3 concern should be evidenced as part of the terms of the
4 agreement, those kinds of things.

5 I don't think what we are indicating is
6 is that we are going to come out with any kind of
7 recommendation, if we so deemed it necessary, as to who
8 specifically should be awarded the licences; that is
9 not within purview of the Board per se. Those licences
10 are granted under legislation and under the discretion
11 of the body which has the power to grant those
12 licences.

13 I don't think that is what we are
14 attempting to get at, if we entertain in our decision
15 concerns relating to licensing at all.

16 MR. COSMAN: Thank you then, Mr.
17 Chairman.

18 THE CHAIRMAN: Does that help?

19 MR. COSMAN: That is helpful. If we do
20 have concerns with respect to specific matters,
21 probably be the best thing to do, rather than to deal
22 with it in the abstract, wait to see what is being put
23 forward.

24 THE CHAIRMAN: We realize in making such
25 a ruling there will be questions that arise as the

1 evidence comes in or as parties seek to cross-examine
2 that may need some clarification, and we will try and
3 address it on ad hoc basis in that context.

4 MR. FREIDIN: Mr. Chairman, it maybe
5 helpful if you could provide just some further
6 information to guide me in terms of the scope of my
7 cross-examination.

8 Just two comments in relation to this
9 who part, I just have two questions. Is it the Board's
10 interpretation that the Board intends to suggest that
11 one of the things it could look at would be to, in
12 fact, define the criteria that the licence issuer
13 should use in determining who should get a licence, No.
14 1; and the second question is: You commented that you
15 would be looking at perhaps making recommendations in
16 relation to employment practices, and I wonder whether
17 you can give some guidance as to what you envisage or
18 contemplate by that?

19 MR. COSMAN: That would be very helpful
20 to me also, Mr. Chairman.

21 THE CHAIRMAN: Well, we don't feel we can
22 really be that specific at this point because what we
23 are looking at is the total environmental impact,
24 social and economic, under the definition of
25 environment in the Act and how licensing affects that,

1 and we have no idea at this point quite frankly until
2 we've had the evidence put before us as to what
3 particular form those considerations will take.

4 What we are saying is, is that we have
5 identified from the evidence to date that has been put
6 forward by the proponent that licensing does play a
7 part in managing that resource, that is one of the ways
8 the proponent manages the resource, it's one of the
9 ways that the activities are carried out by parties
10 under licence, and from that perspective we feel that
11 since we are looking at a planning process in respect
12 of those activities we should be able to look at the
13 generic topic of licensing without going specifically
14 into recommendations which might affect existing
15 licences which have been granted and the parties have
16 been operating thereunder.

17 Now, how far we go depends to a large
18 extent on what is allowed in terms of the specific
19 questions and how that all fits into what we consider
20 to be social and economic impact. That is certainly
21 relevant, in our view, to our decision.

22 So I am sorry, Mr. Freidin, I don't think
23 we can be really more specific at this time.

24 MR. FREIDIN: Okay.

25 MR. COSMAN: Finally then, Mr. Chairman,

1 from a procedural perspective, I take it the room given
2 what we have ahead of us, is going to be set up on this
3 wall. I wonder could that be done on Friday. I wonder
4 if I could have some of my people just come to look at
5 it.

6 THE CHAIRMAN: Sure. We will try and
7 have them set it up, maybe Friday in a way to
8 accommodate three witnesses and their supporters and in
9 a way that the court reporters can be accommodated, and
10 all we know for sure is that we will be right here.

11 MS. SEABORN: Mr. Chairman, just on a
12 procedural matter. Over the next two months a number
13 of filing deadlines, for example interrogatories and
14 scoping. Should those documents be sent to the office
15 in Toronto to Ms. Devaul's attention? We have been in
16 the past sending them both to Toronto and to Thunder
17 Bay.

18 THE CHAIRMAN: Yes. Well, you might also
19 send them to the attention of Ms. Valerie Sonstenes if
20 they are coming to Toronto.

21 MS. BLASTORAH: Mr. Chairman, could I ask
22 you to spell that name.

23 THE CHAIRMAN: Sorry, S-o-n-s-t-e-n-e-s.

24 Now, the only problem that arises is
25 that we have the reading room up in Thunder Bay and

1 that, I assume, will still function while we are
2 briefly in Toronto at least during this brief interlude
3 and some of the parties may not be coming down for the
4 next few weeks.

5 When we leave Thunder Bay later in the
6 spring for the more lengthy session which will be in
7 Toronto, that is for OFAH's case and also FFT's,
8 Forests for Tomorrow, we likely will be closing that
9 office in Thunder Bay and the records, so to speak,
10 will be out of this office or the office where we are
11 going to be conducting the hearing, the location where
12 we will actually be conducting that portion of the
13 hearing.

14 So to answer your question, I suppose for
15 the short term we should be delivering copies of the
16 material to both places.

17 MS. SEABORN: Thank you.

18 THE CHAIRMAN: Okay.

19 Thank you. Ten a.m. on Monday.

20 ---Whereupon the hearing adjourned at 3:55 p.m., to
21 be reconvened on Monday, February 5th, 1989,
commencing at 10:00 a.m.

22 [copyright, 1985]
23
24
25

